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No. 10-

IN THE

Supreme Court of the United States

DONALD ALDRIDGE, et al.,

Petitioners,

v.

CITY OF MEMPHIS and LARRY GODWIN
in his individual capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The police director of Memphis, Tennessee, by administrative fiat, abruptly removed all tenured police Captains, average age 56 ½ and over 45 per cent of whom were African American or female, from their rank without a hearing. The Captains were told to accept demotion or take retirement, while larger numbers of younger officers were promoted with increases in pay. The Captains had earned their rank pursuant to the Memphis City Charter, and the Charter specified removal or demotion for "just cause." The questions presented are:

1. Whether the Sixth Circuit's summary decision—that cost-savings and operational efficiency qualified as "reasonable factors other than age" justifying the removal of older employees from their jobs and the promotion of younger employees to essentially the same jobs when the petitioners undisputedly disproved the veracity of those factors—contravenes this Court's holding in *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), that the employer bears the burden of both production and persuasion for the "reasonable factors other than age" affirmative defense under 29 U.S.C. § 623(f)(1).

2. Whether petitioners, who were tenured by the Memphis City Charter and subject to "just cause" removal, had a property interest in continued employment, and whether their removal by a single police official without a hearing violated their rights to due process under the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioners Donald Aldridge, Norma Julie Barrow, Claudette Boyd, Walter Carver, Kenneth Connatser, Charles Freeman, Larry Jackson, James Jones, Jr., Ernest Lancaster, Richard Millen, Bertha Nelson, David O'Bryan, George Olive, Cham Payne, Alan Pendleton, William Phillips, William Porter, David Robertson, Robert Stone, Roy Thomas, Lennel Torrance, Mike Wagner, and Tommy Woods are individuals who served as Captains in the Memphis, Tennessee police force. The respondents are the City of Memphis, Tennessee and Larry Godwin, the former police director of Memphis.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Donald Aldridge, Norma Julie Barrow, Claudette Boyd, Walter Carver, Kenneth Connatser, Charles Freeman, Larry Jackson, James Jones, Jr., Ernest Lancaster, Richard Millen, Bertha Nelson, David O'Bryan, George Olive, Cham Payne, Alan Pendleton, William Phillips, William Porter, David Robertson, Robert Stone, Roy Thomas, Lennel Torrance, Mike Wagner, and Tommy Woods respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reproduced in the Appendix. App. 1a.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2010. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Age Discrimination in Employment Act, 29 U.S.C. § 623 (a), (f)

(a) It shall be unlawful for an employer—

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(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . .

Memphis City Charter § 67

Any fireman or policeman, who shall have served the City of Memphis for a period of thirty (30) years, either continuously or intermittently, shall, at the expiration of said thirty years, automatically be promoted to the rank of captain of the fire division or captain of the police division, with all the salary, emoluments and other privileges of said rank; and, upon the retirement of such fireman or policeman, he shall receive a pension as captain.

Automatic promotion to the rank of captain in either the fire service division or the police division as set out in the above paragraph shall not apply to any person employed by the city after the date of January 31, 1979.

Priv. Acts 1927, Ch. 521; Ord. No. 2725, § 1, May 23, 1978.

Memphis City Charter § 129

[N]o person or employee holding an office or position classified and graded under the provisions of this Act shall be removed or discharged except for just cause.

Priv. Acts 1949, Ch. 129, § 14, p. 321 (superseded 1982).

Memphis City Charter § 246

The City may terminate, suspend, or demote an employee for just cause, and the employee shall be given written notice of the reasons for the action. Just cause shall exist when the employer had a reasonable basis for the action taken. Enumeration of the above-stated disciplinary actions, which are reviewable by the commission, shall not be construed as a limitation on the powers of the City to impose other less stringent disciplinary measures which shall not be appealable to the commission.

Ord. No. 3233, § 4, August 31, 1982.

STATEMENT OF THE CASE

A. Introduction

This case involves a challenge to a decision by the Director of the Memphis Police Department to abolish the rank of Captain. The decision, announced on February 18, 2005, resulted in the immediate demotion of 93 officers who held the rank of Captain. Twenty-six of the former Captains, twenty-three of whom are petitioners here,

brought this action against the City of Memphis ("City") and the Memphis Police Department Director, Larry Godwin, alleging violations of their rights to Due Process and Equal Protection under the Fourteenth Amendment and 42 U.S.C. § 1983, race and sex discrimination in violation of 42 U.S.C. §§ 1981 and 2000e-2, age discrimination in violation of 29 U.S.C. § 623, age, race and sex discrimination in violation of the Tennessee Human Rights Act, breach of contract and tortious interference with contract.[1]

In a decision issued on December 14, 2010, the United States Court of Appeals for the Sixth Circuit affirmed the district court decisions granting summary judgment to respondents on all claims. App. 2a.

B. Factual Background

In 1927, the Tennessee Legislature amended the Charter of the City of Memphis by adding § 67 authorizing the automatic promotion of policemen to the rank of Captain after 30 years of service. When petitioners were hired, Charter § 129 then in effect provided that no employees in petitioners' classification "shall be removed or discharged except for just cause." Section 129 was superseded in 1982 when the Charter was amended and provided, in § 246:

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1. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343; 29 U.S.C. § 626(c); 42 U.S.C. §§ 1983, 2000e-5(f), and supplemental jurisdiction over the Tennessee constitutional, statutory and common law claims pursuant to 28 U.S.C. § 1367.

> The City may terminate, suspend, or demote an employee for just cause, and the employee shall be given written notice of the reasons for the action. Just cause shall exist when the employer had a reasonable basis for the action taken. . . .

For the first 78 years after § 67 was enacted, the City paid all eligible employees of the Police Department the Captain's salary until they either chose to retire, were promoted to a higher rank, or were terminated for just cause. Before the rank was abolished, the Department had never terminated, demoted or suspended a Captain without just cause or expressly informed Captains that they could be terminated, demoted or suspended without cause. App. 6a.

However, few blacks and women were beneficiaries of this provision because of the City's history of discriminatory employment practices. The City hired its first black police officer in 1948, and its first woman in 1973. The first African American was promoted to Captain under § 67 in 1981, and the first woman was promoted to Captain in 1988. App. 4a. After 1981, no other African Americans were promoted to Captain until 1992, when four were promoted.

The February 2005 decision to eliminate the rank of Captain had a harsh effect on African Americans and women:

> Of the 60 black tenure captains in the Department's history, 45% had attained that rank in the nine months immediately before the rank was abolished. Meanwhile, 71%

> of the seven female tenure captains in the Department's history had attained that rank since 2002.

App. 8a. The 2004 surge in Captain promotions among blacks and women was the result of hiring starting 30 years earlier.

In 1974, the United States sued the City for discrimination against blacks and women in its hiring and promotion examinations. *United States v. City of Memphis*, Civ. No. 74-286 (W.D. Tenn.). On February 12, 1979, the City stipulated in a case challenging police promotion practices that "blacks have been excluded from or limited in hiring and promotion opportunities within its police department, and that the effects of that history are reflected in the present make-up of the promotional ranks in the police department." *Afro American Police Ass'n v. City of Memphis*, No. C-75-38, Stip. of Facts ¶ 1. The City entered into a consent decree to remedy its discriminatory hiring and promotion practices. App. 4a.

In 1978, § 67 of the Charter was amended, ending the right to promotion to the rank of Captain after 30 years of service for employees hired after January 31, 1979. Ord. No. 2725, § 1. Persons hired prior to January 31, 1979, however, retained their right to promotion under § 67 and the City continued to make such promotions. Between 1976 and March 22, 2002, there were 192 promotions under § 67 –167 were white males, 23 were African Americans and 2 were women.

In 1991, the Department created the new title of "Major" to distinguish those promoted on the basis of testing from those Captains promoted on the basis of tenure. Despite the difference in title, the Department treated the ranks of Captain and Major as parallel ranks.[2] Captains and Majors received the same training and salary and were both eligible to compete for promotion to the rank of Inspector. Godwin dep. 93. Each newly appointed Captain received a week-long supervisor's training course and was tested prior to assuming his or her duties. Captains and Majors were assigned jobs by the police director.

In the fall of 2004, 81 of the Captains were assigned to Major or Lieutenant positions. Tusant (Dep. Chief Adm. Affairs) dep. 70-71. Like Captains, Majors were also expected to work as Lieutenants when needed. Godwin dep. 93. It is undisputed that all Captains were performing their duties satisfactorily. There was no study or analysis showing any difference in job performance between Captains, who were promoted based on tenure, and Majors, who were promoted based on a test. Godwin dep. 22; Essex (Dir. Human Resources) dep. 46-65. Moreover, at this time, the Department had a shortage of Lieutenants by 50 to 60 persons and a shortage of Majors by approximately 40 persons. Tusant dep. 40. Historically, when there was a shortage of Majors or Lieutenants, the Department assigned Captains to those positions. Godwin dep. 72; Tusant dep. 41.

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2. The Department utilized the following ascending ranks for its civil service employees: Patrol Officer, Sergeant, Lieutenant, Captain/Major, Inspector.

In August of 2004, Larry Godwin became the Interim Director of the Department. He was confirmed in the Director's position in November of 2004. Godwin dep. 100. Prior to his appointment as Director, Godwin frequently expressed extreme hostility toward the Captains. He told one colleague, "those goddamn Captains need to die. They are ruining the police department. They need to go." App. 8a. He said there were not over a "handful of captains" on the job "worth a damn," and called the Captains "worthless pieces of shit." App. 9a.

On February 18, 2005, Godwin assembled the Captains and announced that he was abolishing the Captain rank effective February 25, 2005. He immediately put all Captains on one week of paid leave during which time they were to decide whether to accept a demotion to the rank they held prior to promotion to Captain or to retire. Godwin told the Captains that the reason for his decision was that "the city's in the midst of a serious financial situation. In order for the city to have funds to meet payroll and its obligations, spending must be significantly reduced." This was not true. Godwin admitted that the Department would have had a budget surplus even if the Captain rank had not been abolished. App. 5a-7a.

Godwin subsequently asserted that he made the decision for reasons of "operational necessity," and that financial considerations accounted for only 1% of the reasoning behind the decision. Godwin dep. 162. Godwin never explained with any specificity what he meant by the term "operational necessity." He defined "operational necessity" as "[t]he need within the department to operate on a daily basis." Godwin dep. 52-55. He admitted that he

was unaware of any documents, reports or records that supported his position that the rank of Captain was not "operationally necessary." Godwin dep. 163. Respondents' Chief Administrative Officer could not think of any financial justification to abolish the Captain rank while the Department's budget was being increased. McGee dep. 132. The Deputy Director of the Department was "totally shocked" by the decision and testified that he would not have abolished the rank because the Captains could have been utilized as they currently were. Dobbins dep. 9-11.

The same day that Godwin notified the Captains of the elimination of their rank, by special order, the Department temporarily appointed 52 Sergeants, selected on an entirely subjective basis, to "Acting" Lieutenant. None of these Sergeants had ever served as Lieutenants. Godwin dep. 21. The Department gave the "Acting" Lieutenants extra pay for serving in a higher rank. None of the Captains who had been trained as supervisors and served as supervisors were selected as "Acting" Lieutenants.

In June of 2005, the Department rescinded the "Acting Lieutenant" assignments and permanently promoted 120 Sergeants to Lieutenant and 49 Lieutenants to Major. App. 6a. None of the former Captains were promoted to these positions. *See* Gutman Aff. ¶¶ 15-18.[3]

Only employees over the age of 40 were adversely affected by the elimination of the Captain rank. The average age of the 93 Captains was 56.52. The average

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3. Arthur Gutman, petitioners' expert witness in industrial and organizational psychology, conducted a statistical analysis of the abolishment of the Captain rank.

age of persons in all other ranks—none of which were adversely affected by the decision—was 37.81. The 100% adverse impact on those over age 40 is statistically significant at the .0001 level. Gutman Aff. ¶ 12. 40.9% of the then-serving Captains adversely affected by the February 18, 2005 decision were African Americans. *Id.* ¶ 24.

C. Ruling Below

The court of appeals affirmed the grant of summary judgment to respondents on all of petitioners' claims. The court upheld the denial of petitioners' due process claims, finding that the Captains lacked a property interest in continued employment. App. 10a-15a. The court concluded that § 67 did not create such an interest, based on Tennessee state lower court decisions. It concluded that Charter provision § 246 did not create a property interest in continued employment despite its "just cause" language because it appears in a section of the Charter that authorizes the City's Civil Service Commission, and the Commission's jurisdiction is limited to review of disciplinary actions, which this was not. App. 13a. The court did not address Charter provision § 129, which was in effect when petitioners were hired.

On petitioners' age discrimination claim, the court of appeals held that the respondents met their burden of demonstrating that the decision is explained by a reasonable factor other than age ("RFOA"). The court found that the decision was justified by the inefficiency of paying the Captains more than lower-ranked officers to perform the same duties as those officers. App. 25a. In addition, the court held that "demoting employees of a particular seniority status for cost-saving and operational considerations" qualifies as a RFOA. *Id.*

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision is an unfortunate vestige of a bygone era in the enforcement of civil rights. African Americans and women who benefited from earlier civil rights litigation obtained tenure as Memphis police Captains in significant numbers only in 2004, when they "climbed rapidly" in that position. App. 5a. A Memphis City Charter provision granted them the tenured rank after 30 years of service. In early 2005, by administrative fiat and without any form of hearing, the police director abolished the Captain rank and immediately demoted the 93 incumbents to their last held position. The director then filled more than 150 supervisory positions, without opportunity for the former Captains to re-advance in those positions. It took 54 years after the 1927 enactment of the automatic promotion law for the first African American to reach Captain. It took a brief meeting on February 18, 2005 to divest and demote 93 Captains, over 45 per cent of whom were the African Americans and women who had benefited from earlier civil rights lawsuits against the City.

These actions deprived petitioners of an important property right without due process of law. Contrary to the decision of the Sixth Circuit, the challenged actions also were not shown to be justified by "reasonable factors other than age" under the Age Discrimination in Employment Act (ADEA). Because the Sixth Circuit's decision departs so far from decades of jurisprudence of this Court in enforcing due process rights and more recently from decisions under the ADEA, review by this Court is essential.

I. THE MISAPPLICATION OF THE "REASONABLE FACTORS OTHER THAN AGE" AFFIRMATIVE DEFENSE BY THE SIXTH CIRCUIT PRESENTS AN IMPORTANT ISSUE THAT SHOULD BE REVIEWED BY THIS COURT.

The February 2005 action of the police director in abolishing the Captain rank and demoting all Captains had a profound disparate impact on the basis of age, particularly with respect to older African American and female Captains whose ranks had swelled significantly only shortly before the challenged action. The average age of the Captains was 56.52. 11.25% of all the Department's employees over age 40 were impacted by the decision; below age 40, none were impacted, accounting for the 100% disparate impact upon those over age 40. 45% of the African American tenured Captains in the Department's history had reached that status in the nine months before the rank was abolished, and 71% of the female tenured Captains had reached the rank since 2002.

The court of appeals assumed that petitioners could establish a prima facie case of disparate impact under the ADEA,[4] but held that they could not prevail on

4. The assumption was well-grounded in fact. The single action of abolishing the Captain rank foreclosing new opportunity for advancement easily satisfies the requirement to "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 100 (2008). And the statistical disparity was well-shown, not only with respect to the 100% disparate impact on older workers in the abolishment of the Captain rank, but also with respect to the age disparities in advancements of younger workers that occurred afterwards.

that claim "because defendants have met their burden of demonstrating that the practice is supported by an RFOA." App. 25a. The court of appeals' decision conflicts with the statutory requirement and this Court's recent rulings because it did not shift the burden of proof to the respondents on the RFOA affirmative defense. Left uncorrected, the Sixth Circuit's decision will undermine the order of proof in ADEA disparate impact cases carefully delineated by this Court, and leave adversely affected older workers without a remedy where intentional discrimination is not shown.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court ruled that the ADEA authorizes claims of disparate impact liability. In *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), the Court ruled that the RFOA defense is an affirmative defense for which the employer carries the burden of persuasion. The Sixth Circuit's decision virtually eviscerates the burden-shifting requirement.

The court of appeals summarily determined that respondents had met their burden of proving the RFOA defense because they "adduced evidence" showing that it was inefficient to pay Captains a higher salary where they performed duties associated with lower ranks. App. 25a. Adducing evidence is not the same as carrying a party's burden of persuasion on an affirmative defense, especially where the matter is decided on summary judgment, where the underlying facts are in dispute, and where the court's conclusion is dependent on rough and inaccurate characterizations of the evidence before it. *See Meacham*, 554 U.S. at 101 (discussing the difference between production and persuasion). This fundamental departure from the statutory rubric should be reviewed

and corrected, and the remainder of the court's opinion illustrates why a course correction is needed to implement this Court's ADEA decisions.

Elsewhere in the opinion the court accepted the City's argument that the Captains were "not operationally necessary," based on the same facts concerning payment of a higher Captain's salary where functions of lower ranks were performed. App. 17a. That was in the portion of the opinion rejecting petitioners' race and sex discrimination claims on the basis that respondents had met their burden of production of a legitimate, nondiscriminatory reason for terminating the entire Captain position. *Id.* By definition, the mere burden of production of articulating a nondiscriminatory reason is not the same as meeting a burden of persuasion that the action is based on a *reasonable* factor other than age. *See Meacham*, 554 U.S. at 101 (burden of persuasion on employer in RFOA case is "harder" than if the employer merely had the burden of production).

A vague articulation of operational efficiency is not the same as proof that the challenged practice is reasonably designed to foster a legitimate business purpose and is reasonably administered to achieve that purpose. In *Smith*, 544 U.S. at 242, this Court upheld the RFOA defense because it "responded to the City's legitimate goal of retaining police officers." Thus, there should be no doubt that, to establish an RFOA defense, "an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose. . . ." *See* Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination

in Employment Act,75 Fed. Reg. 7212, 7218 (Feb. 18, 2010) (EEOC Notice of Proposed Rulemaking, 29 C.F.R. § 1625.7(b)(1)).

Here the evidence did not demonstrate the reasonableness of the challenged action under these standards on a summary record. The overall conclusion of the court of appeals that "cost-saving" (App. 25a) was shown to be an RFOA here is unfounded, both factually and legally.[5] The "savings" in salaries among demoted Captains were vastly eclipsed by the salary increases given to more than 150 younger individuals promoted on an acting and permanent basis.

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5. The Sixth Circuit drew its conclusion that demoting senior employees for cost savings qualifies as an RFOA from *Allen v. Highlands Hospital Corp.*, 545 F.3d 387, 405 (6th Cir. 2008): "We recently held that the 'terminat[ion of] employees based on seniority to facilitate the hiring of new, less costly employees' qualified as an RFOA." App. 25a. This statement is troublesome, because in *Allen* the RFOA issue was not determinative on appeal. The *Allen* court ruled that disparate *treatment* age claims could not stand because the quoted official "endeavored to target employees based on *seniority*, not age." 545 F.3d at 394 (emphasis in original). The *Allen* plaintiffs' disparate *impact* claim failed because they did not identify a specific employment practice that disproportionately impacted employees over age 40 and they failed to proffer statistics showing that older workers were disproportionately harmed. *Id.* at 403-05. Therefore, the *Allen* plaintiffs' disparate impact claim failed before the RFOA was reached. Moreover, the district court had erroneously placed the burden on plaintiffs to disprove an RFOA, so the Sixth Circuit's passing reference to its agreement with the district court's RFOA holding was dictum. *Id.* at 405.

Moreover, an examination of the evidence underlying the "cost-saving" assertion confirms that it could not support an RFOA finding for respondents. First, Godwin's stated reason in telling the Captains that he was abolishing their rank and demoting them—that significant spending cuts were needed to meet payroll and other obligations in light of the City's financial crisis, App. 5a-6a—was untrue and effectively abandoned as a justification. App. 7a. Second, Godwin's statement that he saw "no operational need" for Captains was a mere incantation without the benefit of any objective study or report, *see* App. 18a, and an attempt to "escape liability simply by articulating a vague, inoffensive-sounding subjective criteria...." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1009 (1988) (Blackmun, J., concurring). Indeed, respondents' Chief Administrative Officer conceded there was no justification to abolish the Captain rank from a financial perspective. McGee dep 132. Third, the court of appeals' acceptance that "the majority" of the Captains performed duties of employees "as many as three ranks lower," App. 5a, 17a, is at odds with the evidence that 81 of the 93 Captains were assigned in the supervisory positions of Lieutenant or Major. Tusant dep. 70-71. And fourth, the lack of reasonableness of the challenged action is underscored by the fact that there was a shortage in supervisory positions. By June 2005, the shortfall was made up by 120 promotions to Lieutenant and 49 Lieutenants to Major, App. 6a, but none of those came from the former Captain ranks. *See* Gutman Aff. ¶¶ 15-18. The police director and his staff were responsible for assigning Captains to specific jobs, Tusant dep. 75, and could have assigned Captains to supervisory positions as had occurred historically.

In examining this issue, the Court also should clarify how reasonableness in the context of the RFOA defense is related to the showing of the degree of disparate impact.

In *Meacham*, this Court observed that the more plainly reasonable the employer's non-age factor is, the shorter the step from production to persuasion on the RFOA defense. 554 U.S. at 101. By extension, the stronger a plaintiff's showing of disparate impact, or the more obvious it is, the more closely the court should scrutinize the employer's proffered non-age based justification. *See* 75 Fed. Reg. 7212. *supra*, at 7215. "A mere insubstantial justification . . . will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). The court below assumed that petitioners could show disparate impact, but focused on the relatively small, four year average age difference between Captains and Majors. App. 7a. Particularly given the promotion patterns after the Captains were demoted, the more appropriate comparison is the approximately 19-year average age difference between the Captains and all other employees on the force. Gutman Aff. ¶ 6. *Cf. Wards Cove*, 490 U.S. at 650-51 (relevant comparison is between the persons in the at-issue jobs and the qualified persons in the larger labor market).

The plurality of this Court in *Smith* noted that the RFOA provision is not a "safe harbor from liability." 544 U.S. at 238. Instead, the RFOA defense only shields an employer from liability if the "adverse impact was attributable to a nonage factor that was 'reasonable.'" *Id.* at 239. Although the Court in *Meacham* established the burden of proof for an RFOA, the result in this case illustrates that the lower courts need additional guidance and explication on the contours of "reasonable" in a disparate impact case where the employer invokes the RFOA defense.

II. THE DEPRIVATION OF IMPORTANT TENURED PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW SHOULD BE REVIEWED BY THIS COURT.

The Sixth Circuit justified the actions of Godwin and rejected petitioners' claims by ruling that petitioners were at will employees without a property interest in their position who could be stripped of their position and immediately demoted without a hearing. The court relied heavily on an unpublished intermediate Tennessee court decision in opining what the Tennessee Supreme Court would decide in the circumstances. App. 10a-15a. The court's misapplication of both federal and state law in reaching its decision is an error that of course should be corrected in the course of this Court's review of the case. More fundamentally, however, this Court should review the matter because of the Sixth Circuit's serious departure from the bulwark principles governing the determination of due process rights of public employees. The due process claims also merit review by this Court because of the context in which they arose, on the heels of black and female officers just reaching the tenured Captain rank in significant numbers.

A. Creation of Property Interest

A "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Property interests are not created by the Constitution itself, but derive "from an independent source such as

state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Although the underlying substantive interest may be created by state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005).

A property interest in employment can be created by ordinance. *Bishop v. Wood*, 426 U.S. 341, 344 (1976). The Sixth Circuit recognized, but did not follow in this case, the principle that "[s]tatutes providing that [public] employees cannot be discharged or demoted without cause . . . give the employee a protected property interest in continued employment" cognizable under the Due Process Clause. App. 12a, quoting *Williams v. Comm. of Kentucky*, 24 F.3d 1526, 1537-38 (6th Cir. 1994).

B. Charter Section 67

Section 67 of the Memphis City Charter, enacted in 1927, provides in relevant part:

> Any fireman or policeman, who shall have served the City of Memphis for a period of thirty (30) years, either continuously or intermittently, shall, at the expiration of said thirty years, automatically be promoted to the rank of Captain of the Fire Department or Captain of the Police Department, with all the salary, emoluments and other privileges of said rank; and that, upon the retirement of such fireman or policeman, he shall receive a pension as Captain.

As with any legislative enactment, the starting point of construction is the plain language of the provision. *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009). Section 67 of course is devoid of any language stating that a tenured Captain can be removed from the rank at the will of the employer. Moreover, the structure of the provision clearly provides an entitlement to continued employment in the position. Simply stated, the provision has two operative parts, the employment part and the retirement part. The Sixth Circuit misread the employment part to stop at the point of automatic promotion. The structural language directs otherwise. The "promotion" to Captain is accompanied by "all the salary, emoluments and other privileges of said rank." These by their nature do not get enjoyed instantaneously only at the moment of promotion; rather, they are the essence of continued employment in the Captain rank. The suggestion by the Sixth Circuit that the employment clause is merely a "retirement tool," App. 11a, is thus at odds with the plain language of the Charter.

The Sixth Circuit relied primarily upon the unpublished opinion in *Burrell v. City of Memphis*, No. 29, 1989 Tenn. App. LEXIS 544 (Tenn. Ct. App. Aug., 16, 1989), for the conclusion that Section 67 guarantees automatic promotion and a pension, but not continued employment. App. 11a-12a. This Court upon review should not defer to the Sixth Circuit's inappropriate embracement of *Burrell*, in light of the plain "salary, emoluments and other privileges" language of Section 67 not addressed by that court. The *Burrell* court likewise did not address the rights under Charter Sections 129 and 246 discussed immediately below. Also, as an unpublished decision, *Burrell* does not constitute "controlling authority" and has no precedential value. *See* Tenn. Sup. Ct. Rule 4(G)

(1)5; *In Re Adoption of E.N.R.*, 42 S.W.3d 26, 31 n.2 (Tenn. 2001); *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 n.2 (Tenn. 1991).[6]

The consistent historical context of the treatment of police Captains supports the plain language construction of Section 67. In examining the "mutually explicit understandings" surrounding petitioners' property interests under Section 67, the Court should give strong consideration to the fact that, both before and after *Burrell*, and "[b]efore the rank was abolished, the Department had never terminated, demoted, or suspended a captain without just cause or expressly informed captains that they could be terminated, demoted or suspended without cause." App. 6a.

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6. The Sixth Circuit's citation of two other Tennessee appellate decisions regarding Section 67 likewise should not alter the decision to review. App. 11a. The issue in *Posey v. City of Memphis*, 23 S.W.3d 332 (Tenn. Ct. App. 2000), was identifying the proper "comparable rank" to be used by the City when calculating the fire captain's pension after the fire captain rank had been abolished. *Posey*, 23 S.W.3d at 334. The Tennessee Court of Appeals in an unpublished opinion following remand in *Posey* eventually concluded that fire captains and police captains were not sufficiently similarly situated to warrant application of the equal protection clause. *Posey v. City of Memphis*, 164 S.W.3d 575, 579 (Tenn. Ct. App. 2004). In the second case, the issue was whether time spent as a police reserve would be credited toward the thirty years of service required by § 67, not the right of continued employment after promotion to captain. *Dunlap v. City of Memphis*, No. W2003-02649-COA-R3-CV, 2004 Tenn. App. LEXIS 738, *2 (Tenn. Ct. App. Nov. 12, 2004).

C. Charter Sections 129 and 246

When the petitioners were hired, Charter § 129 applied to them and provided: "no person or employee holding an office or position classified and graded under the provisions of this Act shall be removed or discharged except for just cause." This type of provision clearly creates "a protected property interest in [the] job." *Williams*, 24 F.3d at 1538. Section 129 is not mentioned in the decision below.

Section 129 was superseded in 1982 by an amendment to the Charter which provides, in Section 246:

> The City may terminate, suspend, or demote an employee for just cause, and the employee shall be given written notice of the reasons for the action. Just cause shall exist when the employer had a reasonable basis for the action taken.

While recognizing that statutes with explicit "just cause" provisions create protected property interests under the Fourteenth Amendment, the court of appeals ruled that this provision "is simply inapplicable to terminations or demotions for other-than-disciplinary reasons." App. 12a-13a. It reached its conclusion on the idea that, since the provision was under the part of the Charter dealing with the Civil Service Commission, and since that body did not have jurisdiction to review non-disciplinary employee terminations by the City, it would be "illogical" to discern that the just cause language created a free-standing property interest that the Commission could not enforce. App. 13a.

These conclusions of the Sixth Circuit are "not draw[n] upon a deep well of state-specific expertise," *Town of Castle Rock*, 545 U.S. at 757, and should be reviewed without deference to the court of appeals. As explained above, the reliance on unpublished intermediate appellate Tennessee decisions regarding Section 67 was misplaced. With regard to Sections 129 and 246, the jurisprudence of the Tennessee Supreme Court indicates that court would come to a different conclusion. The Tennessee Supreme Court has not endorsed the Sixth Circuit's "logical" reading of Section 246. When read with its predecessor provision in Section 129, there is no reason to believe that the breadth of the property protection in continued employment was diminished by the amendment.

Petitioners were hired under Section 129 and their employment rights were vested therein. That alone is sufficient to create an ongoing protected property interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (property interest in public employment, once conferred, may not be deprived without appropriate procedural safeguards).

Moreover, if, as the court of appeals concluded, § 246 applies only to "disciplinary actions" and City employees are "at will" for all other purposes, then § 246 would operate to take away petitioners' vested right under § 129 not to be arbitrarily removed or discharged. When a statute takes away a vested right or impairs a contractual obligation, its retroactive application is constitutionally forbidden under Tennessee law. *See* Tenn. Const. Art. 1, § 20; *Estate of Bell v. Shelby County Health Care Corp.*, 318 S.W.3d 823, 835-36 (Tenn. 2010); *Collier v. Memphis Light Gas & Water Div.*, 657 S.W.2d 771, 775 (Tenn. Ct.

App. 1983); *Anderson v. Memphis Hous. Auth.*, 534 S.W.2d 125, 127 (Tenn. Ct. App. 1975). Therefore, § 246 cannot apply retroactively to petitioners.

D. Police Director's Unilateral Action

The deprivation of due process in this case is magnified by the vehicle with which the challenged action was carried out. The abolishment of the Captain rank was effected not by amendment of the Charter, but rather by the unilateral action of the police director. This violated both the due process requirements of the Fourteenth Amendment and the Tennessee Constitution. The Sixth Circuit's faulty tacit assumption that Godwin's unilateral action stood on the same legal footing as valid legislative action should be reviewed and corrected.

A Charter right is qualitatively different from personnel benefits conferred by ordinance or policy. The Charter is the "constitution" of local government in Tennessee. *East Tennessee State Univ. v. Mayor of Knoxville*, 65 Tenn. 166, 171-172 (Tenn. 1873). "The provisions of the charter are mandatory, and must be obeyed by the city and its agents; and, if in conflict with an ordinance, the charter must prevail." *Marshall & Bruce Co. v. City of Nashville*, 71 S.W. 815, 819 (Tenn. 1903); *see also Barnes v. Ingram*, 397 S.W.2d 821 (Tenn. 1965); *see Allmand v. Pavletic*, 292 S.W.3d 618, 625-26 (Tenn. 2009) ("Fundamental in [Tennessee] law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes.").

City administrators or police directors have no authority to deprive eligible employees of the benefits

created by Charter §§ 67, 129 and 246 properly construed. "A pattern of non-compliance, no matter how long established, does not vitiate a charter requirement. The only escape from its burden is repeal in the manner prescribed by the charter; mere fiat the city can never suffice." *State ex.rel. Lewis v. Bowman*, 814 S.W.2d 369, 373 (Tenn. Ct. App. 1991) (quoting *Wilgus v. City of Murfreesboro*, 532 S.W.2d 50, 52 n.1 (Tenn. Ct. App. 1975)).

The "fiat" in this case especially offends due process because of the arbitrary and irrational manner in which the decision was carried out. A fair hearing would have a gone a long way to unwind the chaotic, erroneous, and unfounded shifting rationales for Godwin's actions. The state law underpinnings of the invalidity of the challenged actions are reinforced by the principle asserted by this Court long ago: "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should . . . be entitled to protection in the absence of adequate remedy at law." *Truax v. Raich*, 239 U.S. 33, 38 (1915).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 11, 2011

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED DECEMBER 14, 2010

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 10a0756n.06

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 08-6046

DONALD ALDRIDGE, NORMA JULIE BARROW, CLAUDETTE BOYD, WALTER CARVER, KENNETH CONNATSER, CHARLES FREEMAN, JAMES HOLLAND, JAMES HOLMES, RICKY HUTCHESON, LARRY JACKSON, JAMES JONES, JR., ERNEST LANCASTER, RICHARD MILLEN, BERTHA NELSON, DAVID O'BRYAN, GEORGE OLIVE, CHAM PAYNE, ALAN PENDLETON, WILLIAM PHILLIPS, WILLIAM PORTER, DAVID ROBERTSON, ROBERT STONE, ROY THOMAS, LENNEL TORRANCE, MIKE WAGNER, and TOMMY WOODS,

Plaintiffs-Appellants,

v.

CITY OF MEMPHIS and LARRY GODWIN IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

Appendix A

On Appeal from the United States District Court for the Western District of Tennessee

Before: BOGGS, MOORE, and GIBSON, Circuit Judges.*

BOGGS, Circuit Judge. Plaintiffs, 26 former captains in the Memphis Police Department ("Department"), appeal from the district court's grant of summary judgment. This action arose when the Department abolished the rank of captain and, without a hearing, demoted all then-captains to their former ranks. A subset of the demoted captains filed suit against the City of Memphis ("City") and the Department's Director, Mike Godwin ("Godwin"), alleging breach of contract and violations of the Due Process Clause, Equal Protection Clause, Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 1981, the Age Discrimination in Employment Act ("ADEA"), and the Tennessee Human Rights Act ("THRA"); against Godwin, plaintiffs also alleged tortious interference with their employment relationship. The district court granted summary judgment for the defendants on all claims. Reviewing de novo, *see Petty v. County of Franklin, Ohio*, 478 F.3d 341, 345 (6th Cir. 2007), we affirm.

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*The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix A

BACKGROUND

The genesis of this dispute occurred in 1927, when a section was inserted into the City's charter ("Charter") providing:

> Automatic Promotion to captain after thirty years.
>
> Any fireman or policeman, who shall have served the City of Memphis for a period of thirty (30) years, either continuously or intermittently, shall, at the expiration of said thirty years, automatically be promoted to the rank of captain of the fire division or captain of the police division, with all the salary, emoluments and other privileges of said rank; and, upon the retirement of such fireman or policeman, he shall receive a pension as captain.

City Charter § 67 (Priv. Acts 1927, Ch. 521; Ord. No. 2725, § 1, 5-23-78) ("§ 67").[1] For much of the Department's modern history, captain was the second-highest civil-service rank in its hierarchy. The only rank above captain was inspector; below captain, in descending order, came the ranks of lieutenant, sergeant, and finally, patrol officer. Generally, officers were promoted through the ranks one step at a time on the basis of competitive testing.

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1. In 1978, additional language was added to the Charter eliminating automatic promotion for employees hired after January 31, 1979. As plaintiffs were all hired before that date, the Charter amendment has no effect on them.

Under § 67, however, any officer completing 30 years of service was immediately promoted to captain, regardless of how far he or she had progressed through the ranks and regardless of the skills he or she had attained. Consequently, some captains held that rank on the basis of testing ("merit captains"), while others held that rank solely on the basis of length of service ("tenure captains").

It is undisputed that, in prior years, the Department has had legal difficulties with respect to the hiring of African-Americans and women. Until 1948, the Department did not hire a single African-American officer. In 1974, the United States sued the City, alleging that the Department utilized discriminatory hiring and promotional tests; the City admitted in a binding stipulation that historically, minorities had "been excluded from or limited in hiring and promotional opportunities within its police department." Consequently, the City entered into a consent decree to remedy the underrepresentation of African-Americans and females in the Department's ranks. The first African- American officer did not achieve 30 years' tenure and promotion to captain under § 67 until 1981, and the first female, until 1988.

In 1991, the Department gave merit captains the new title of "major" to distinguish them from tenure captains, leaving only the latter with the title "captain." After this redesignation, captain and major were considered parallel ranks in the Department's hierarchy, both above lieutenant but below inspector. Both captains and majors received the same salary and pension benefits. Both were eligible to compete for merit-based promotion to inspector.

Appendix A

In 2004, the first of the cohort of black and female officers hired under the 1974 consent decree completed thirty years of service. Consequently, the number of black and female captains climbed rapidly.

In August of that year, Godwin, a white male and long-time officer with the Department, became its new Director. As one of his first tasks, Godwin instructed Deputy Chief Jim Tusant to examine how the tenure-based captain rank squared with the Department's organizational needs. Tusant determined that, although captains were paid the same salary as majors, the majority of captains were performing tasks typical of lower-ranked (and lower-paid) officers, including lieutenants, sergeants, and even patrol officers, the entry-level rank.[2] Based on this, Godwin concluded that the captain rank was inefficient and "operationally unnecessary." Although no formal budgetary analysis was conducted, Godwin estimated that eliminating the rank of captain and reverting captains to the ranks they had held before their automatic promotion would save the Department approximately $1.4 million.[3]

On February 18, 2005, Godwin assembled the captains and told them, "[T]he city's in the midst of a serious financial situation. In order for the city to have funds to meet payroll and its obligations, spending must be

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2. There is no dispute, however, that the captains were all performing those duties satisfactorily.

3. The annual salary differential between captains and lieutenants was $8,046.27; between captains and sergeants, $12,907.65; and between captain and patrol officers, $17,802.93.

significantly reduced." He then announced that the captain rank would be eliminated. Then-captains were given the choice to retire or revert to their rank and salary prior to their automatic promotion. Those who chose to stay on in their former rank would be eligible to participate in the next promotional process alongside the other employees of that rank. Regardless of his or her choice, upon retirement – at that time, or in the future – each then-captain would receive all pension benefits to which captains had been theretofore entitled.

None of the captains had an express written or oral employment contract. Before the rank was abolished, the Department had never terminated, demoted or suspended a captain without just cause or expressly informed captains that they could be terminated, demoted or suspended without cause. However, in 1988, the City had eliminated the tenured captain rank in the Memphis *Fire* Department (which had also been governed by § 67) and terminated all but one of the employees holding that rank.

Days after the captain rank was abolished, the Department temporarily promoted approximately 52 sergeants to "acting lieutenant." The Department had already been short 50-60 lieutenants prior to these events. None of those appointed acting lieutenants were newly demoted ex-captains. In June 2005, the acting lieutenant assignments were rescinded; the Department then permanently promoted 120 sergeants to lieutenant and 49 lieutenants to major. This round of promotions had been planned independently of, and prior to, the decision

to eliminate the captain rank, as the department had a serious shortage of lieutenants and majors.[4]

Notwithstanding Godwin's statements at the February 18, 2005 meeting, the City's Chief Administrative Officer ("CAO") testified that in February 2005, the City was not in danger of failing to meet its payroll and that eliminating the rank of captain was not necessary to meet payroll. Additionally, Godwin testified at his deposition that the Department would have had a budget surplus even if the captain rank had not been abolished. However, the CAO did testify that the City had "organizational financial challenges" at the time, that the City needed to reduce spending to increase its reserve fund, and that "during that time period . . . all [City] divisions were asked to reduce their budget . . . ."

At the time of Godwin's announcement, the 93 captains had an average age of 56.52; of necessity, each was older than 40. By comparison, the average age of the majors – the most comparable group of officers in terms of salary and prestige – was 52.16 (or 4.36 years younger than the average captain). Plaintiffs' own statistical expert testified that the majors "were basically the same age distribution as [the] captains" and that, though "[t]hey were slightly younger, . . . there wouldn't have been a statistical

4. The parties do not address whether any of those permanently promoted in June 2005 to lieutenant or major were ex-captains. Plaintiffs do not assert a separate "failure to promote" claim based on these subsequent actions.

difference."[5] Of all the Department's employees over age 40, 11.25% were impacted by the decision to abolish the rank of captain; by contrast, of the employees below age 40, none were impacted.

At the time the rank was abolished, a majority of the captains were Caucasian (59.1%, versus 40.9% African-American) and a supermajority were male (94.6%, versus 5.4% female). Of the 60 black tenure captains in the Department's history, 45% had attained that rank in the nine months immediately before the rank was abolished. Meanwhile, 71% of the seven female tenure captains in the Department's history had attained that rank since 2002.

The record is devoid of evidence that Godwin or any other City or Department employee displayed explicit animus toward any protected class. However, there is evidence that Godwin made rude or derogatory remarks about individual captains and about the captain rank in general. On one occasion in 1998, he told a colleague, "[T]hose goddamn Captains need to die. They are ruining the police department. They need to go."[6] At other times, he remarked that captains were unable to "pour piss out

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5. While ranks other than major are less comparable to the captain rank, the average ages of the remaining civil-service ranks were: patrol officer, 36.23; sergeant, 42.39; lieutenant, 46.51, and inspector, 57.77.

6. Plaintiffs do not argue that Godwin's "Captains need to die" remark was an oblique reference to the captains' age. Nor, in this context, would such an assertion be plausible. Godwin himself was 53.37 years of age at the time – scarcely younger than the average captain.

of a boot," that captains were "worthless pieces of shit," and that there were not more than a "handful of captains" in the Department "worth a damn." At one captain's promotion ceremony, Godwin told a co-worker, "I don't know nothing about this woman, but she hung around here 30 years." While the record does not reflect the dates on which Godwin made most of these remarks, it is clear that at least two of them predate the 2004 spike in the number of African- American and female captains.

On December 27, 2005, 26 demoted captains filed suit against the City and Godwin. Sixteen of the plaintiffs are white males, seven are black males, two are black females and one is a white female. All 26 plaintiffs alleged (1) that the abolition of the captain rank without a pre-deprivation hearing violated the Due Process Clause; (2) that it lacked a rational basis and/or was motivated by "animus against captains" in violation of the Equal Protection Clause; (3) that it constituted disparate-treatment and disparate-impact discrimination on the basis of age in violation of the ADEA and THRA; (4) that it breached the City's employment contract with plaintiffs and its contractual duty of good faith and fair dealing; and (5) that Godwin had tortiously interfered with those contractual relationships. The African-American plaintiffs also argued (6) that the abolition constituted disparate-treatment race discrimination in violation of the Equal Protection Clause, Title VII, 42 U.S.C. § 1981, and the THRA; and the female plaintiffs argued (7) that it constituted disparate-treatment sex discrimination in violation of the Equal Protection Clause, Title VII, and the THRA.

Appendix A

In a series of orders culminating on August 13, 2008, the district court granted summary judgment in defendants' favor as to all claims and dismissed the action. Plaintiffs timely appealed.

DISCUSSION

I. Due Process

Plaintiffs argue that their demotion without a pre-deprivation hearing deprived them of a property interest without due process.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property." *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). "Such interests do not arise from the Constitution itself, but rather, 'are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source . . . .'" *Woolsey v. Hunt*, 932 F.2d 555, 564 (6th Cir. 1991) (quoting *Roth*, 408 U.S. at 577). Such independent sources include state statutes and regulations, explicit contractual guarantees, or even "agreements implied from 'the [defendants'] words and conduct in the light of the surrounding circumstances . . . .'" *Ibid.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)); *see also Bishop v. Wood*, 426 U.S. 341, 344 (1976).

Thus, plaintiffs' due process claim "hinges on whether anything in Tennessee statute, common law, or regulation creates [a property] interest" in their

continued employment as captains. *Lisle v. Metro. Gov't of Nashville*, 73 F. App'x 782, 785 (6th Cir. 2003). As a baseline, "Tennessee has long recognized the doctrine of employment at will, with the mutual right of either party to terminate such a relationship with or without cause." *Id.* at 786 (quoting *Brown v. City of Niota*, 214 F.3d 718, 720 (6th Cir. 2000)). Thus, plaintiffs' asserted property interest turns on the existence of some statute, regulation, or agreement that varies this background rule.

A. *Section 67 of the Memphis City Charter*

First, plaintiffs argue that § 67 of the Charter, which entitles officers with 30 years' service to "the rank of captain[,]" "all the salary, emoluments and other privileges of said rank[,]" and "a pension as captain," creates a property interest in their continued employment as captains. While this is not a facially implausible reading of § 67, the Tennessee state courts have repeatedly held to the contrary. *See Dunlap v. City of Memphis*, No. W2003-02649-COA-R3-CV, 2004 Tenn. App. LEXIS 738, at *12 (Tenn. Ct. App. Nov. 12, 2004) ("[Section 67] is a guarantee that officers with thirty years of service can *retire* at the rank of Captain, with pension benefits of a Captain, but [it] provides no guarantee of employment beyond the automatic promotion." (emphasis in original)); *Posey v. City of Memphis*, 23 S.W.3d 332, 335 (Tenn. Ct. App. 2000) ("[T]he automatic promotion provision of Section 67 [is] purely a retirement tool. . . . [It guarantees] no automatic benefit if employment is continued after thirty years."); *Burrell v. City of Memphis*, No. 29, 1989 Tenn. App. LEXIS 544, at *3 (Tenn. Ct. App. Aug. 16,

1989) ("[W]hile Section 67 of the Charter provide[s] for automatic promotion to captain [after] thirty years of service as well as a captain's pension upon retirement, the section [does] not require the City to continue employment of the plaintiffs for any length of time.").

While we are not bound by these cases, "[w]e will accept the holding of a state intermediate appellate court with respect to state law unless we determine the highest court of the state would decide otherwise." *United States v. Philp*, 460 F.3d 729, 732 (6th Cir. 2006). We see no reason to believe that the Tennessee Supreme Court would reject this twenty-year-old line of cases. Accordingly, we agree with the district court that the abolition of the captain rank did not derogate from any property interest guaranteed by § 67.[7]

B. *Section 246 of the Memphis City Charter*

Next, plaintiffs argue that the abolition of the captain rank violated a property interest secured by § 246 of the Charter, which provides that "[t]he City may terminate, suspend, or demote an employee for just cause . . . ." Plaintiffs are correct that "[s]tatutes providing that [public] employees cannot be discharged or demoted without cause . . . give the employee a protected property interest in continued employment" cognizable under the Due Process Clause. *Williams v. Comm. of Kentucky*,

7. On the other hand, as interpreted by the Tennessee courts, § 67 clearly *does* give plaintiffs a protected property interest in their captain-level *pension benefits*. However, plaintiffs' pensions were not affected by the abolition of the captain rank.

24 F.3d 1526, 1537-38 (6th Cir. 1994). However, we agree with the district court that § 246 is simply inapplicable to terminations or demotions for other-than-disciplinary reasons.

Section 246 falls under Article 34 of the City Charter, which creates and empowers the City's Civil Service Commission ("Commission"). That § 246 is found under this Article implies that its "just cause" language must be interpreted in light of the purpose and jurisdiction of the Commission, which is "to review disciplinary actions . . . ." Charter § 245; *see also City of Memphis v. Civil Serv. Comm'n*, 1985 Tenn. App. LEXIS 3244, at *5 (Tenn. Ct. App. Nov. 19, 1985) ("[T]he Commission does not have jurisdiction to review non-disciplinary employee terminations by the City."). It would be illogical to conclude that the drafters of § 246 intended its "just cause" language to create a freestanding property interest that the Commission could not enforce. Furthermore, immediately following the "just cause" language at issue, § 246 states that "[e]numeration of the above-stated *disciplinary* actions [i.e., termination, suspension, or demotion], which are reviewable by the [C]ommission, shall not be construed as a limitation on powers of the City to impose other less stringent *disciplinary* measures which shall not be appealable to the [C]ommission" (emphasis added). This proviso strongly suggests that section's "just cause" language is inapplicable to nondisciplinary personnel actions. We therefore hold that any property interest created by § 246 is not abridged by non-disciplinary personnel actions such as the one at issue here.

C. *Implied Contract*

Finally, plaintiffs argue that the City's course of conduct – specifically, the Department's past practice of allowing all captains to retain that rank until they chose to retire, were promoted, or were terminated for cause – gave rise to a property interest in the form of an implied contract of continued employment. While the Supreme Court has recognized that a property interest in continued employment can be created by "agreements implied from the [employer's] words and conduct in the light of the surrounding circumstances," *Perry*, 408 U.S. at 602 (internal quotation marks omitted), it has emphasized that "the sufficiency of [such a] claim of entitlement must be decided by reference to state [contract] law." *Bishop*, 426 U.S. at 344; *see also Perry*, 408 U.S. at 602 n.7 ("If it is the law of Texas that a teacher in the respondent's position has no [implied contractual] claim to job tenure, the respondent's claim would be defeated.").

Under Tennessee contract law, a contractual interest in continued employment will not be inferred on behalf of an at-will employee from an employer's conduct absent a "show[ing] that the agreement . . . was supported by adequate consideration [other than the employee's past services], that there was a mutual assent to the terms of the agreement and that it was sufficiently definite to be enforceable." *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 933 (Tenn. Ct. App. 1984) (holding that employer's statement that otherwise at-will employee "would never have to worry about employment because of the service he had rendered to the company in the past" did not create enforceable expectation of continued employment); *see also White v. Fort Sanders-Park West*

Med. Ctr., No. E2006-00330-COA-R3-CV, 2007 WL 241024, at *3 (Tenn. Ct. App. Jan. 29, 2007). Here, as the district court properly noted, "[p]laintiffs have offered no evidence of consideration for the implied contract beyond their services, for which they were undisputedly paid." *Aldridge v. City of Memphis*, No. 05-2966 B, 2007 WL 4570881, at *5 (W.D. Tenn. Dec. 27, 2007).

Furthermore, background circumstances establish that no mutual understanding of life tenure could reasonably have existed here. Although neither party cites it, we take judicial notice that the Memphis City Code contains a section providing that the "[s]ervices of any employee may be terminated when the necessity for his or her job or position no longer exists or when funding is no longer available . . . ." City Code § 3-8-7 (2007) (formerly § 9-41(1985)). Moreover, it is undisputed that, over twenty years ago, the City eliminated the tenured captain rank in its Fire Department, which was governed by the same charter provision, and outright terminated all but one of the officers holding that rank. *See Burrell*, 1989 Tenn. App. LEXIS 544, at *4-*5.

Accordingly, no implied contract exists under Tennessee law, and thus, there is no property interest protected by the Due Process Clause.[8]

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8. Before the trial court, plaintiffs asserted a state-law breach-of-implied-contract claim against the City in addition to their due-process claim based on implied contract. Plaintiffs have not argued their independent contract claim on appeal; accordingly, it is waived. *See United States v. Phinazee*, 515 F.3d 511, 520 (6th Cir. 2008). Even if they had pursued their contract claim, however, it would fail for these same reasons.

II. Race and Sex Discrimination

Plaintiffs assert that the decision to eliminate the captain rank constituted intentional disparate treatment on the basis of race and sex.[9] Where, as here, no direct evidence of discrimination exists, disparate-treatment race- and sex-discrimination claims are analyzed using the well-known *McDonnell Douglas* proof structure. *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). We assume, without deciding, that plaintiffs are able to make out a prima facie case of race and sex discrimination under *McDonnell Douglas*.

Once a prima facie case of discrimination is established, the employer "must articulate a legitimate non-discriminatory reason" for the employment decision. *Upshaw*, 576 F.3d at 585. "This is merely a burden of production, not of persuasion, and it does not involve a

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9. Plaintiffs' claims under the Equal Protection Clause, 42 U.S.C. § 1981, Title VII, and the THRA are analyzed identically. *See Miller v. City of Canton*, 319 F. App'x 411, 419 (6th Cir. 2009); *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 673 (6th Cir. 2008); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988). We note that 42 U.S.C. § 1981 proscribes intentional racial discrimination in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions *of the contractual relationship*." 42 U.S.C. § 1981(b) (emphasis added). District courts in this circuit have held that at-will employees in Tennessee possess a "contract" for purposes of § 1981. *See Henry v. Trammell Crow SE, Inc.*, 34 F. Supp. 2d 629, 635 (W.D. Tenn. 1998). We assume arguendo that this is the case.

credibility assessment." *Ibid.* The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing "admissible evidence of a legitimate, nondiscriminatory reason" for the elimination of the captain position. *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 524 (6th Cir. 2007). Defendants submit that the captain rank was eliminated because it was "not operationally necessary" and "superfluous" – *i.e.*, captains were paid a major's salary while many performed the duties of employees as many as three ranks lower and who earned as much as $17,802.93 less per year. Appellees' Br. at 37-39. Thus, defendants have met their burden of production by establishing a nondiscriminatory reason for terminating the captain position, *Blair*, 505 F.3d at 524, and "the mandatory presumption of discrimination created by the prima facie test drops from the case." *Lindsay v. Yates*, 578 F.3d 407, 421 (6th Cir. 2009) (internal quotation marks omitted).

If the employer carries its burden, "the plaintiff must identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination." *Blair*, 505 F.3d at 524. "A plaintiff may establish that an employer's stated reason for its employment action was pretextual by showing that the reason (1) had no basis in fact, (2) did not actually motivate the challenged conduct, or (3) is insufficient to explain the challenged conduct." *Upshaw*, 576 F.3d at 586. "The plaintiff must produce sufficient evidence from which the jury could reasonably reject [the defendants'] explanation and infer that the defendants intentionally discriminated against him." *Ibid.* (internal quotation marks omitted)

(alteration in original); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("[R]ejection of the defendant's proferred reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" but does not "*compel[]*" a finding of discrimination.).

To show that defendants' asserted rationale was a pretext for discrimination, plaintiffs first argue that there was "no study that concluded the captain rank caused any inefficiency in police operations" and "no report or study that showed how abolishing the rank . . . could produce any savings for the City." Appellants' Br. at 37-38, 43. However, there is no dispute that many (if not most) captains drew salaries out of proportion to the job duties that they actually performed. It does not take a formal study to draw a permissible conclusion that this was inefficient; "[t]he decisional process used by the employer [need not] be optimal [nor must it leave] no stone unturned." *Haughton v. Orchid Automation*, 206 F. App'x 524, 532 (6th Cir. 2006) (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir.1998)) (second and third alterations in *Haughton*); *accord EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1198 (10th Cir. 2000) ("[T]he failure to conduct a formal study of the benefits realized by [an employment practice], standing alone, does not undermine Defendant's assertion that it had a good-faith belief the [practice] reduced . . . costs."). The absence of a formal cost-cutting study does not provide sufficient evidence from which a jury could infer that the defendants discriminated against the captains on the basis of race or sex.

Plaintiffs also allege that defendants' current justification of the abolition – that the rank was

"operationally unnecessary" – is inconsistent with Godwin's initial statement upon announcing the abolition that the City was "in the midst of a serious financial situation" and that "[i]n order for the City to have funds to meet payroll and its obligations, spending [had to] be significantly reduced." We have held that "[a]n employer's changing rationale for making an adverse employment decision can be evidence of pretext" because "[s]hifting justifications over time calls the credibility of those justifications into question." *Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 592 (6th Cir. 2002). However, "[t]he *extent* to which such shifting justifications are probative of pretext depends upon the circumstances of a given case" and the magnitude of the inconsistency. *Eades v. Brookdale Senior Living, Inc.*, No. 08-6549, 2010 WL 3927246, at *5 (6th Cir. Sept. 22, 2010) (unpublished opinion) (citing *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 n.4 (6th Cir. 2009)); Here, whether the asserted explanation is a "serious financial situation" *requiring* cost-cutting or a mere desire to eliminate financial inefficiency, the unnecessary expense of the captains' salaries has always been at issue. Thus, the City has consistently justified the changes on the grounds of efficiency.

Relatedly, plaintiffs point to evidence that Godwin's statement that the City was in danger of failing to meet payroll was false. As plaintiffs note, the City's CAO testified that there was actually no danger of failing to meet payroll, and Godwin himself testified that the Department would have had a budget surplus even if the rank had not been abolished. However, the CAO also testified that the City had "organizational financial challenges" at the time,

that the City needed to reduce spending to increase its reserve fund, and that "during that time period . . . all [City] divisions were asked to reduce their budget . . . ." Thus, while the evidence certainly allows the inference that Godwin, to save face, exaggerated the budgetary pressures that led him to make his decision, plaintiffs have not produced evidence from which a reasonable jury could conclude that illegal motivations more likely explained the elimination of the captain rank. *Blair*, 505 F.3d at 533 n.15. *See Gatch v. Milacron, Inc.*, 111 F. App'x 785, 791 (6th Cir. 2004) ("[E]ven if the [reduction in force] was not entirely necessary from a business standpoint, . . . [t]his evidence simply does not permit a finding that . . . discrimination rather than business judgment motivated [it] . . . ."); *see also Schuster v. Lucent Techs., Inc.*, 327 F.3d 569, 577-78 (7th Cir. 2003) ("Even accepting that [the employer] may have at times over-defended its decision, we believe that its overall account is substantially consistent with that of a company seeking to reduce costs . . . .").[10]

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10. Plaintiffs insisted at oral argument that defendants' cost-saving explanation cannot be believed because the Department conducted a round of merit-based promotions to lieutenant and major shortly after the captain rank was abolished. However, it is undisputed that there was a serious pre-existing shortage of lieutenants and majors before the abolition. While the Department's decision to make these promotions may be further evidence that the Department was not on the brink of insolvency, its choice to incur operationally necessary expenses does not imply that the abolition of the captain rank was not motivated by cost-saving considerations. Plaintiffs' argument is akin to suggesting that an individual's choice to forego dessert with his meal could not have been motivated by weight-loss considerations because he ate *something* rather than fasting completely.

Accordingly, the district court's grant of summary judgment to defendants with respect to plaintiffs' race- and sex-discrimination claims was proper.

III. Age Discrimination

Under the ADEA, it is unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

29 U.S.C. § 623(a). The first clause above has been interpreted as proscribing intentional disparate treatment on the basis of age, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993), while the second clause has been interpreted as proscribing facially neutral employment practices with a disparate impact based on age, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005). Plaintiffs allege both forms of age discrimination.[11]

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11. "We apply the same analysis to [plaintiffs'] discrimination claims brought under the THRA as to [their] claims brought under . . . the ADEA." *Jones v. Memphis Light, Gas and Water Div.*, No. 08-6212, 2009 WL 2974888, at *4 (6th Cir. Sept. 17, 2009).

Appendix A

A. *Disparate Treatment*

A plaintiff may establish disparate treatment in violation of the ADEA by either direct or circumstantial evidence. *Geiger v. Tower Auto.*, 579 F.3d 614, 620 (2009). Plaintiffs argue that the district court erred by finding a lack of direct evidence of age discrimination. Specifically, plaintiffs argue, defendants admitted that "every employee holding the Captain rank had to be over age 40" by virtue of the 30-year service requirement. Appellants' Br. at 51. This, however, is not direct evidence of intent to discriminate based on age.

"Direct evidence of discrimination is that evidence which, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Ibid.* (emphasis added); *see also Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) (stating that "a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent."). The Supreme Court has made clear that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age" and that such factors include "an employee's pension status or seniority, that is empirically correlated with age." *Hazen Paper*, 507 U.S. at 608-09; *see also Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 3270 (2008). Captain status is an age-correlated factor. Plaintiffs' asserted "direct evidence" does not "*require*[] the conclusion" that age, rather than captain status itself, motivated the decision to abolish the rank.

Plaintiffs' disparate-treatment age-discrimination claim must therefore be proved, if at all, using the *McDonnell Douglas* proof structure. *Geiger*, 579 F.3d at 622.[12] However, as discussed above, even assuming for the sake of argument that plaintiffs can make out a prima facie case under *McDonnell Douglas*, defendants have asserted a legitimate non-discriminatory reason, and plaintiffs have not adduced sufficient evidence of pretext. Accordingly, plaintiffs' disparate-treatment agediscrimination claim was properly dismissed.

B. *Disparate Impact*

"[W]hen bringing a disparate impact claim [under the ADEA], plaintiffs need not show that a defendant intended to discriminate, but must instead prove that a particular employment practice, although neutral on its face, has produced a significant adverse effect on [older workers] . . . ." *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 830 (6th Cir. 2000). "The plaintiff must first establish a prima facie case by identifying and challenging a specific

12. As we noted in *Geiger*, the Supreme Court in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009), rejected an evidentiary framework that shifts the burden of persuasion to the defendant-employer in ADEA disparate treatment claims, which this circuit had applied to claims based on direct evidence. *Geiger*, 579 F.3d at 621. However, the *Gross* Court expressly declined to decide whether the separate *McDonnell Douglas* burden-shifting framework applies to the ADEA. *Geiger*, 579 F.3d at 622. Because this circuit has "long found the *McDonnell Douglas* framework useful in analyzing circumstantial evidence of ADEA claims," and because *Gross* did not clearly proscribe this practice, we apply it here. *Ibid.*

[facially neutral] employment practice, and then show an adverse effect by offering statistical evidence of a kind or degree sufficient to show that the practice in question has caused the adverse effect in question." *Ibid.* (internal quotation marks omitted). The ADEA's disparate-impact coverage is "significantly narrow[er]" than Title VII's, as the ADEA "provides that it shall not be unlawful for an employer 'to take any action [with a disparate impact on older workers] . . . where the differentiation is based on reasonable factors other than age [("RFOA")] . . . ." *Smith*, 544 U.S. at 238. "[O]nce a plaintiff has satisfied [the prima facie burden], the burden of persuasion shifts to the employer to show that the practice is supported by a RFOA." *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 404 (6th Cir. 2008).

Once again, we assume for the sake of argument that plaintiffs can establish a prima facie case of disparate impact under the ADEA – *i.e.*, that the elimination of the captain rank is a facially neutral employment practice with a disparate impact based on age.[13] Even so, plaintiffs' disparate-impact age-discrimination claim

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13. Defendants argue that plaintiffs have not identified a valid "employment practice" because the abolition of the captain rank targeted only a specific subgroup of employees instead of being "applied across the workforce . . . ." Appellants' Br. at 50-51. The district court agreed, although it cited in support only one out-of-circuit case, *EEOC v. Allstate Insurance Co.*, 528 F.3d 1042 (8th Cir. 2008), which was vacated upon the grant of rehearing en banc. The EEOC has filed an amicus brief arguing that the district court's interpretation of *Allstate* is incorrect. Because resolution of this question is not necessary to the disposition of this case, we take no position on it.

cannot prevail because defendants have met their burden of demonstrating that the practice is supported by an RFOA. *Allen*, 545 F.3d at 404. The RFOA inquiry is one of reasonableness. *See Smith*, 544 U.S. at 243 ("Unlike the business necessity test [under Title VII's disparate-impact branch], which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry [under the ADEA] includes no such requirement"). As the district court found, there is no genuine issue of material fact as to the reasonableness of the factors other than age offered by the defendants to explain the disparate impact.

Here, once again, defendants have adduced evidence showing that the employment action was based on the inefficiency of paying the captains more (in some cases, tens of thousands of dollars more) than patrol officers, sergeants, or lieutenants to perform the very same duties those lower-ranked officers performed. We recently held that the "terminat[ion of] employees based on seniority to facilitate the hiring of new, less costly employees" qualified as an RFOA. *Allen*, 545 F.3d at 405. That being the case, demoting employees of a particular seniority status for cost-saving and operational considerations surely qualifies as well. Whether there were more logical or less disruptive ways for the Department to increase its operating efficiency is beside the point. *Smith*, 544 U.S. at 243.

IV. Residual Equal-Protection Claim

In addition to asserting more traditional equal-protection claims based on their membership in protected classes, which we have already addressed, plaintiffs argue that the abolition of the captain rank fails even rational-basis review under the Equal Protection Clause because defendants' decision to single out the captains for demotion was "wholly arbitrary and irrational," Am. Compl. ¶ 65, and/or "motivated by animus and ill-will," Appellants' Br. at 63.

The Supreme Court has recognized that plaintiffs may assert a claim under the Equal Protection Clause even if they do not claim membership in any class or group, "where [they] allege[] that [they have] been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also Engquist v. Oregon Dep't of Ag.*, 128 S. Ct. 2146, 2149 (2008) (plaintiff "alleg[ed] that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for 'arbitrary, vindictive, and malicious reasons'"). While such equal-protection claims are generally termed "class-of-one" claims, *see Olech*, 528 U.S. at 564; *Engquist*, 128 S. Ct. at 2149, this term is something of a misnomer; the hallmark of such a claim is not the allegation that *one individual* was singled out, but rather, the allegation of arbitrary or malicious treatment not based on membership in a disfavored class. *See Olech*, 528 U.S. at 564 n. (noting, despite the Court's characterization of the plaintiff's

claim as a "class-of-one" claim, that "the complaint in this case could be read to allege a class of five"); *Franks v. Rubitschun*, 312 F. App'x 764, 766 n.2 (6th Cir. 2009) ("Although such claims are typically referred to as class-of-one claims, there is no requirement that the challenged government action single out one solitary person.").

There is reason, however, to question whether plaintiffs may assert their residual equal protection claim at all in light of *Engquist v. Oregon Department of Agriculture*, in which the Court held that "the class-of-one theory of equal protection does not apply in the public employment context." 553 U.S. at 598. We need not decide the limits of *Enguist* here, however, because plaintiffs' residual equal-protection claim suffers from other fatal deficiencies.

First, "[t]o satisfy [the Equal Protection Clause's] threshold inquiry, [plaintiffs] must allege that [they] and other individuals who were treated differently were similarly situated in all material respects." *Taylor Acquisitions, L.L.C. v. City of Taylor*, 313 F. App'x 826, 836 (6th Cir. 2009). Plaintiffs attempt to cast in this comparative role the captains in former years who were never demoted; however, prior generations of captains were not subject to Godwin's supervision, and there is no evidence that the Department faced similar logistical and budgetary concerns in the past. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) ("[T]he individuals with whom the plaintiff[s] seek[] to compare [their] treatment must have dealt with the same supervisor[and] have been subject to the same standards . . . .").

Plaintiffs also suggest that they were similarly situated to probationary police officers, who, like captains, receive salary increases for completing a specified length of service; however, probationary officers are entry-level, non-civil-service employees who are not similar to captains in any other respect.

Furthermore, even if plaintiffs could pass the "similarly situated" hurdle, "governmental action subject to equal protection scrutiny under the rational basis test must be sustained if *any* conceivable basis rationally supports it." *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton County*, 430 F.3d 783 (6th Cir. 2005) (citing *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993)) (emphasis in original). Under rational-basis review, a defendant has "no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'" *Ibid.* (quoting *Beach Commc'ns*, 508 U.S. at 315)). As discussed above in the race-, sex- and age-discrimination contexts, defendants have presented a legitimate nondiscriminatory reason for their action.[14]

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14. Plaintiffs argue that the existence of a conceivable legitimate reason is beside the point because the abolition of the captain rank was actually "motivated by animus." Appellants' Br. at 63. However, as the district court observed, while disfavored treatment based on animus *alone* cannot pass rational-basis review, *see Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down state action where it "seem[ed] inexplicable by anything but animus toward the class it affects"); *Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997) (stating that "action based

V. Tortious Interference Against Godwin

Lastly, plaintiffs allege that Godwin, in his individual capacity, "intended to [and did] cause the breach of the contract and/or business relationship between the City of Memphis . . . and plaintiffs" in violation of Tennessee law. Am. Compl. ¶ 80. Tennessee recognizes a cause of action for tortious interference with another person's at-will employment. *Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994). However, "a party to a contract cannot be liable for tortious interference with that contract." *Cambio Health Solutions, LLC v. Reardon*, 213 S.W.3d 785, 789 (Tenn. 2006). And, as the Tennessee Supreme Court has held,

> when an . . . employee of a corporation acts within the general range of his authority, and his actions are substantially motivated by an intent to further the interest of the corporation, in claims of intentional interference with

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on . . . animus alone violates the Equal Protection Clause"), the absence of rational basis can be shown by "negativing every conceivable basis which might support the government action or by demonstrating that the challenged government action was motivated by animus or ill-will." *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005) (internal quotation marks and brackets omitted). This is far from such a case. Furthermore, upon closer examination, Godwin's so-called "animus" against captains boils down to indelicately articulated dissatisfaction with the tenure-based promotional system and the value provided by holders of the captain rank. While his alleged comments were crude, they support, rather than undermine, defendants' asserted explanation for the elimination of the rank.

> employment, the action of the . . . employee is considered to be the action of the corporation and is entitled to the same immunity from liability.

Forrester, 869 S.W.2d at 334-35. In this case, as in *Forrester*, despite the evidence of Godwin's rude remarks toward captains,

> There is no evidence in the record that [Godwin] had any relationship with [plaintiffs] except through their connection with [the Department]. There is no evidence that [Godwin] harbored any malice, ill will, or other attitude or emotion towards [plaintiffs] *except within the context of [the Department]*. There is no evidence that [Godwin] would benefit personally from [plaintiffs' demotion]. Most importantly, there is no evidence that [Godwin was] acting for any purpose other than [his] perceived best interest for [the Department].

Id. at 334 (emphasis added). Accordingly, Godwin is immune from personal liability for inducing plaintiffs' demotions, and the district court correctly so held.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, DATED AUGUST 12, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 05-2966-STA-dkv

DONALD ALDRIDGE, et al.,

Plaintiffs,

v.

CITY OF MEMPHIS and
LARRY GODWIN in his individual capacity,

Defendants.

ORDER GRANTING DEFENDANT LARRY GODWIN'S MOTION TO DISMISS

Before the Court is Defendant Larry Godwin's Motion to Dismiss, (D.E. # 164), filed on February 5, 2008 and Renewed Motion to Dismiss, (D.E. # 197), filed on August 1, 2008. Plaintiffs responded in opposition to Defendant's first Motion on March 10, 2008. (D.E. # 174.) On July 31, 2008, the Court granted Defendant City of Memphis's Motion for Summary Judgment. For the same reasons set forth in the Order Granting Defendant City of Memphis's

Appendix B

Motion for Summary Judgment, the claims against Defendant Godwin are DISMISSED

In addition to the causes of action asserted against Defendant City of Memphis and Defendant Godwin in his individual capacity, Plaintiffs have also asserted interference with contract rights/ business relationships, and violation of civil rights only against Defendant Godwin. As the Court has already found that Plaintiffs had no contract with Defendant City of Memphis, however, Defendant Godwin cannot be held liable for interference with contract rights/ business relationships.

For the foregoing reasons, the Court **GRANTS** Defendant's Motion to Dismiss. The Clerk will enter judgment accordingly.

IT IS SO ORDERED.

/s/_____
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: August 12th, 2008.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION, DATED JULY 31, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 05-2966-STA-dkv

DONALD ALDRIDGE, et al.,

Plaintiffs,

v.

CITY OF MEMPHIS and
LARRY GODWIN in his individual capacity,

Defendants.

ORDER GRANTING DEFENDANT CITY OF MEMPHIS'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant City of Memphis's Motion for Summary Judgment, (D.E. # 171), filed on February 29, 2008. Plaintiffs responded in opposition on April 17, 2008. (D.E. # 182.) For the reasons set forth below, Defendant's Motion is **GRANTED**.

Appendix C

BACKGROUND

Plaintiffs have brought this action against the City of Memphis (the "City") and Larry Godwin, Memphis Police Department ("MPD") Director of Police Services, in his individual capacity, alleging Breach of Contract, Due Process and Equal Protection violations under 42 U.S.C. § 1983, and age, race, and gender discrimination. Plaintiffs also allege interference with contract rights/ business relationships and violation of civil rights against Defendant Godwin. Plaintiffs are police officers employed by the MPD who had attained the rank of Captain. Under the Memphis City Charter, promotion to Captain was automatic upon completion of thirty years of service. On February 18, 2005, Director Godwin announced the abolishment of the Captain rank in response to a budget crisis being suffered by the City of Memphis. Godwin advised the Captains that they could either immediately retire at their current rank or return to their previous rank.

Nine of the twenty-six Plaintiffs in this case are African American, and three of them are female. The remainder are white males. African American Captains were not treated differently than white Captains at the time of the abolishment of the Captain rank in 2005 nor were female Captains treated differently than male Captains. Rather all Captains were treated the same with respect to Defendant's decision to abolish the Captain rank, and the abolishment of the rank had the same effect on all captains.

In an order entered February 21, 2007, the Court granted partial dismissal to Defendants as to Plaintiffs'

due process claims based on City of Memphis Charter § 67 and claims of gender discrimination under § 1981. The Court also dismissed any § 1981 claims of race discrimination to the extent they were pled independently of § 1983. On December 27, 2007, the Court held, on cross-motions of the parties for summary judgment, that no due process claim arose from an implied contract for continued employment. On January 22, 2008, the Court granted the remainder of Defendant's Motion for Summary Judgment as to Plaintiffs' claims of breach of contract, violation of equal protection, and discrimination on the bases of race, gender and age. On February 1, 2008, Plaintiffs filed an Amended Complaint alleging breach of contract, Due Process and Equal Protection violations under 42 U.S.C. § 1983, age, race, and gender discrimination against all Defendants, and interference with contract rights/business relationships, and violation of civil rights against Defendant Godwin.

SUMMARY JUDGMENT STANDARD

Rule 56 (c) provides that a

> judgment . . . should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.[1]

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1. Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Canderm Pharmacal, Ltd. v. Elder Pharms, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988).

Appendix C

In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party.[2] When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on his pleadings but, rather, must present some "specific facts showing that there is a genuine issue for trial."[3] It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts."[4] These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict.[5] Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[6] In this Circuit, "this requires the nonmoving party to 'put up or shut up' [on] the critical issues of [the] asserted causes of action."[7] Finally, the "judge may not make credibility determinations or weigh the evidence."[8]

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2. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

3. *Celotex*, 477 U.S. at 324.

4. *Matsushita*, 475 U.S. at 586.

5. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

6. *Celotex*, 477 U.S. at 322.

7. *Lord v. Saratoga Capital, Inc.*, 920 F. Supp. 840, 847 (W.D. Tenn. 1995) (citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989)).

8. *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994).

Appendix C

ANALYSIS

A. Breach of Contract

Count One of Plaintiffs' Amended Complaint is titled "Breach of Contract, Due Process and Equal Protection Violations." Plaintiffs assert that their relationship with the City is recognized by Tennessee law as being contractual in nature and that the City has breached the contract and breached its duty of good faith and fair dealing by demoting or causing the termination of Plaintiffs' employment as Captains without just cause and under false pretenses. Plaintiffs assert that they were entitled to due process before any adverse employment action was taken against them including a pre-hearing and a post-hearing, and that Defendant has violated Plaintiffs' due process rights by failing to afford them a hearing. Plaintiffs also allege that Defendant has denied them equal protection by refusing to allow them to continue in the rank of Captain. Plaintiffs further assert that the Deferred Retirement Option Plan ("DROP") was a contract between Plaintiffs and the City. On February 21, 2007, the Court granted partial dismissal as to Plaintiffs' due process claims. Then, in its December 27, 2007, Order, the Court held that no due process claim arose from an implied contract for continued employment between Plaintiffs and the City. On January 22, 2008, the Court granted Summary Judgment on Plaintiffs' breach of contract claim to the extent that it had survived the Court's previous orders. Thus, the Court has already dismissed all breach of contract claims and due process claims against Defendant. To the extent Plaintiffs' Amended Complaint asserts breach of contract claims or due process claims, Defendant's Motion for Summary

Judgment is GRANTED for the reasons stated in the Court's previous Orders.

B. § 1983 Claims

In addition to Title VII, 42 U.S.C. § 1981 and §1983 provide remedies against employment discrimination on the basis of race.[9] "Although § 1981 confers certain rights, the statute itself does not provide a cause of action for race discrimination."[10] In *Jett v. Dallas Independent School District*, the United States Supreme Court held that when a state actor violates an individual's rights under § 1981, § 1983 provides the exclusive remedy.[11] That is, "the express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor."[12] Accordingly, under *Jett*, a suit against a municipality for a violation of rights conferred under § 1981 must be brought pursuant to § 1983 and considered pursuant to § 1983.[13]

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9. *Daniels v. Bd. of Educ. of Ravenna City Sch. Dist.*, 805 F.2d 203, 207 (6th Cir. 1986) (citing *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975); *Poolaw v. City of Anadarko*, 660 F.2d 459, 462 (10th Cir. 1981)).

10. *Malone v. Shelby County Gov't*, No. 04-2810, 2005 WL 2114053, at *2 (W.D. Tenn. Aug. 30, 2005).

11. 491 U.S. 701, 731 (1989).

12. *Jett*, 491 U.S. at 735.

13. *Id.*

Appendix C

Section 1983 imposes liability on any "person who, under color of any statute, ordinance, regulation, custom or usage, of any State" subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution or laws."[14] In order to prevail on such a claim, a § 1983 plaintiff must establish "(1) that there was the deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under color of state law."[15] "Section 1983 is not the source of any substantive right, but merely provides a method for vindicating federal rights elsewhere conferred."[16]

1. Race and Gender Discrimination

The prima facie case and the allocations of the burden of proof are the same for claims of discrimination under 42 U.S.C. § § 1981 and 1983 and Title VII.[17] The Sixth Circuit has noted that

> [a] plaintiff who alleges disparate treatment by a state employer is bringing essentially the same claim under Title VII as under § 1983. If there is liability under Title VII, there should

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14. 42 U.S.C. § 1983 (2008).

15. *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003).

16. *Humes v. Gilless*, 154 F. Supp. 2d 1353, 1357 (W.D. Tenn. 2001).

17. *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004).

> be liability under § 1983. Similarly, if there was no discriminatory intent, there cannot be liability under either Title VII, on a disparate treatment theory, or § 1983.[18]

To establish a claim of race discrimination under § 1981, a plaintiff must show that "(1) he belongs to an identifiable class of persons who are subject to discrimination based on their race; (2) the defendant intended to discriminate against him on the basis of race; and (3) the defendant's discriminatory conduct abridged a right enumerated in section 1981(a)."[19] When a plaintiff attempts to prove intentional discrimination through circumstantial evidence, the court is to follow the burden-shifting framework of *McDonnell Douglas-Burdine* used in Title VII cases.[20]

In order to establish a prima facie claim of racial discrimination under Title VII, a plaintiff must prove four elements: 1) that he is a member of a protected class; 2) that he was qualified for the job; 3) that he suffered an adverse employment decision; and 4) that he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees."[21] If

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18. *Grano v. Dep't of Dev. of City of Columbus*, 637 F.2d 1073, 1082 (6th Cir. 1980).

19. *Amni v. Oberlin College*, 440 F.3d 350, 358 (6th Cir. 2006).

20. *Id.*

21. *Di Carlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004) (citing *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1246 (6th Cir. 1995).

the plaintiff makes his prima facie case, then the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its actions.[22] If the employer meets this burden, the plaintiff must show by a preponderance of the evidence that the reasons offered by the employer were actually a pretext for discrimination.[23] "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[24]

In this case, as discussed in the Court's January 2008 Order, Plaintiffs have failed to demonstrate the forth prong of the prima facie case, that is, that they were treated differently than similarly situated employees outside the protected class. The Court held that Plaintiffs failed to show that protected black and female Captains were treated differently from nonprotected white and male Captains. The Court pointed out that all Captains were treated the same, regardless of the time period or the racial/gender make-up of the rank at any particular time. The Court also determined that Defendant had legitimate, non-discriminatory reasons for abolishing the rank of Captain, and that Plaintiffs failed to prove those reasons were pretextual. Therefore, as with Plaintiff's Title VII claims, Plaintiff's § 1981 claims filed pursuant to § 1983

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22. *Tex. Dep't of Cmty Affaris v. Burdine*, 450 U.S. 248, 253 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

23. *McDonnell Douglass*, 411 U.S. at 804.

24. *Burdine*, 450 U.S. at 253 (citing *Bd. of Tr. of Keene State Coll. v. Sweeny*, 439 U.S. 242, 25 n. 2 (1978)).

cannot survive summary judgment. Thus, Defendant's Motion is GRANTED.

2. Equal Protection

Plaintiffs have also asserted violations of the Equal Protection clause under § 1983. The Equal Protection Clause requires that similarly situated persons be treated alike.[25] For two employees to be similarly situated, the plaintiff must show that the relevant aspects of his employment situation are "nearly identical" to those of the comparison employee whom he alleges was treated more favorably.[26] "The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances."[27] In evaluating whether a comparison employee is similarly situated to a plaintiff, a court should "make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee."[28]

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25. *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

26. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994).

27. *Id.* (quoting *Ruth v. Children's Med. Cent.*, 1991 U.S. App. LEXIS 19062, AT *22 (6th Cir. Aug. 8, 1991)).

28. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998).

Appendix C

a. Similarly Situated Comparators

To show that they were treated differently than similarly situated employees, Plaintiffs compare themselves to individuals promoted to Captain during the seventy eight years prior to Defendant's abolishment of the Captain rank in 2005. The Court has already rejected this argument holding that all Captains were treated the same, regardless of time period. Plaintiffs also attempt to offer as a comparator group patrol officers who had previously received step increases in their salaries based only on years of service and probationary employees who received increased salaries based only on years of service. As proof that these comparator groups are similarly situated to Plaintiffs, Plaintiffs state that the "groups are similar in all relevant aspects of their respective employment circumstances because all were currently employed at the same time and all received salary increases based only on years of service and were permitted to continue to receive those salary increases based on their satisfactory performance of their assigned duties. However, Plaintiffs were the only employees to have their salaries reduced." This statement, however, does not prove that the comparator groups were similarly situated to Plaintiffs. Plaintiffs have not shown that the Captains' job responsibilities including any supervisory responsibilities over subordinate officers or other relevant aspects of their employment were nearly identical to the comparator groups. Plaintiffs had the burden to prove that the relevant aspects of their employment were nearly identical to those of the comparison employees, and Plaintiffs have not carried that burden.

b. Rational Basis

Additionally, Plaintiffs' Equal Protection claims cannot stand as Defendant had a rational basis for abolishing the Captain rank. Governmental action is presumed valid if the classification of groups is rationally related to a legitimate state interest.[29] Under a rational basis review, the government action is entitled to a strong presumption of validity, and the plaintiffs "have the burden 'to negative every conceivable basis which might support it.'"[30] Under this standard, a government agency whose action is challenged on equal protection grounds "has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'"[31] A plaintiff can only make out an equal protection violation if he shows that the governmental action is "irrational."[32]

In this case, the Court finds that Defendant had a rational basis for eliminating the rank of Captain. Defendant

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29. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

30. *Fed. Commc'n Comm'n v. Beach Commc'n, Inc.*, 508 U.S. 307, 314–15 (1993).

31. *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton County, Ohio*, 430 F.3d 783, 790 (6th Cir. 2005) (citing *Beach Commc'n, Inc.*, 508 U.S. at 315 (1993)).

32. *Id.* (citing *Warren v. City of Athens, Ohio*, 411 F.3d 697, 710 (6th Cir. 2005)).

has identified its reasons for abolishing the rank as 1) Captains obtained their promotion based on thirty years of service while other employees were promoted based on merit; 2) many of the Captains were performing the jobs of Patrolmen or Sergeants when they were promoted, but were receiving a salary equivalent to Majors; 3) the Captain rank was not operationally necessary; and 4) Director Godwin believed that eliminating the Captain rank would result in cost savings to the taxpayers. The Court has already determined that Defendant's reasons for abolishing the Captain rank were legitimate and non-discriminatory. Therefore, Plaintiffs have not carried their burden of negativing every conceivable or plausible basis supporting Defendant's actions.

c. Ill will and Malice

Plaintiffs also argue that Defendant's actions were motivated by ill will against Plaintiffs. Plaintiffs argue that Director Godwin possessed animus against Captains, and his decision to abolish the rank was motivated by ill will and malice. A plaintiff may demonstrate that governmental action lacks a rational basis "by 'negativing every conceivable basis which might support' the government action or by demonstrating that the challenged government action was motivated by animus or ill-will."[33] "The desire to effectuate one's animus against [an unpopular group] can never be a legitimate governmental purpose, [and] a state action based on that

33. *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005) (citing *Klimik v. Kent County Sheriff's Dep't*, 91 Fed. Appx. 396, 400 (6th Cir. 2004)).

animus *alone* violates the Equal Protection Clause."[34] As discussed above, however, Defendant has already shown rational reasons for its decision to abolish the Captain rank. Therefore, even assuming that Director Godwin had ill will against the Captains, the decision to abolish the rank was not based on ill will alone, but on reasons rationally related to a legitimate government interest. Therefore, Plaintiff's Equal Protection claims cannot survive summary judgment. Defendant's Motion is GRANTED.

C. Age Discrimination

Plaintiffs next allege that Defendant's abolishment of the Captain rank had a disparate impact against them in violation of the Age Discrimination in Employment Act ("ADEA") and the Tennessee Human Rights Act ("THRA"). Courts analyze THRA claims according to the same standards as ADEA claims.[35] The ADEA provides that

> [i]t shall be unlawful for an employer--
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual

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34. *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006) (citing *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997)) (emphasis added).

35. *See* Tenn. Code Ann. § 4-21-101 (2008); *Southmayd v. Apria Healthcare, Inc.*, 412 F. Supp. 2d 848 (E. D. Tenn. 2006).

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .[36]

Disparate impact claims are available under 29 U.S.C. § 623(a)(2), but not under § 623(a)(1).[37] "[T]he text of section (a)(2) focuses on the effect of an employer's practices on employees generally, which, unlike section (a)(1), gives rise to a disparate-impact claim."[38] When an employer's facially neutral policy has an adverse effect on a protected class, the proper analysis is disparate impact under § 623(a)(2).[39] In order to show disparate impact, a

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36. 29 U.S.C. § 623(a) (2008).

37. *Smith v. City of Jackson*, 544 U.S. 228, 236 n.6 (2005); *EEOC v. Allstate Ins. Co.*, 528 F.3d 1042, 1047 (8th Cir. 2008).

38. *Allstate*, 528 F.3d at 1047 (citing *Smith*, 544 U.S. at 236 n.6).

39. *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 576 (6th Cir. 2004) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). *See also Smith v. City of Jackson*, 544 U.S. 228, 236 n.6 (2005); *EEOC v. Allstate Ins. Co.*, 528 F.3d 1042, 1047 (8th Cir. 2008).

plaintiff need not show intentional discrimination, but must "demonstrate a connection between the challenged practice and the resulting disparities between protected and non-protected classes."[40] A Plaintiff establishes a prima facie case under a disparate impact theory when he identifies the specific employment practice at issue and proves through relevant statistical analysis that the practice has an adverse impact on a protected group.[41] "[I]t is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such impact. Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities."[42]

1. Facially Neutral Employment Policy or Practice

To establish the first element of the prima facie case of disparate impact age discrimination, a plaintiff must identify a facially neutral employment policy or practice

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40. *Id.* (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989)).

41. *Isabel v. City of Memphis*, 404 F.3d 404, 411 (6th Cir. 2005); *see also Butts v. McCullough*, 237 F. Appx. 1, 7 (6th Cir. 2007) (applying statement of prima facie case set forth in *Isabel* to disparate impact claim under ADEA).

42. *Allen v. Sears Roebuck and Co.*, 2007 WL 2406921, at *4 (E.D. Mich. Aug. 20, 2007) (quoting *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005)) (internal quotation marks omitted) (emphasis in original).

that has a disparate impact on the protected group. Plaintiffs identify the abolishment of the Captain rank as the specific employment practice responsible for the disparate impact on older workers. Defendant, on the other hand, argues that the abolishment of the Captain rank falls under 29 U.S.C. § 623(a)(1), and therefore Plaintiffs cannot maintain a disparate impact claim to challenge the abolishment. Defendant asserts that because Plaintiffs claim that the abolishment of the rank of Captain resulted in their reassignment and/or constructive discharge and a reduction of their compensation, their claim should be analyzed under § 623 (a)(1) not § 623 (a)(2), and thus a disparate impact claim cannot stand.

In determining whether Plaintiffs can maintain a disparate impact claim, the Court must first determine whether the abolishment of the Captain rank qualifies as a facially neutral employment policy. The abolishment of a specific rank does not fit the typical mold of an employment "practice or policy" because it only affects one group of employees–here, the Captains.

The Eighth Circuit recently addressed a similar situation in *EEOC v. Allstate*.[43] In that case, the court held that a rehire policy that affected only former employee-agents could be challenged under § 623(a)(2).[44] The district court stated that "the most logical approach is to treat the rehire policy as part of the Reorganization

43. 528 F.3d 1042 (8th Cir. 2008).

44. *Id.* at 1048.

Plan which [affected] all employee-agents."[45] Based on this reasoning, the Eighth Circuit determined that the rehire policy qualified as an employment policy, and a disparate impact claim under § 623(a)(2) could stand. The circuit court was persuaded by the fact that the rehire policy was implemented as part of an employment policy and that it served to deprive a specific group of employees of employment opportunities with the defendant.[46] The court did not find that the elimination of the employee-agent position was a disparate impact violation.[47] Rather, it found that the disparate impact claim was based on the employer's implementation of the rehire policy.[48]

Just as the elimination of the position of employee-agent in *Allstate* could not be challenged under a disparate impact theory, likewise the elimination of the Captain rank does not create a disparate impact violation. In order to fall under § 623(a)(2), the employment practice or policy must "limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities."[49] Here, the abolishment of the rank of Captain was not part of an employment plan that applied to all employees. Rather, it only applied to the Captains. Therefore, the action more properly

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45. *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 990 (E. D. Mo. 2006).

46. *Allstate Ins. Co.*, 528 F.3d at 1048.

47. *Id.* at 1045.

48. *Id.*

49. *Id.* (quoting 29 U.S.C. § 623(a)(2)).

falls under § 623(a)(1) which states that it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ." As the abolishment of the rank affects the compensation, terms, conditions, and privileges of employment, the action must be evaluated under § 623(a)(1) which does not permit disparate impact claims. Defendant's Motion for Summary Judgment must, therefore, be GRANTED.

2. *Statistical Evidence*

Even if the Court were to analyze Plaintiffs' claim under § 623(a)(2), Plaintiffs still could not make out a prima facie case of age discrimination under a disparate impact theory because Plaintiffs' statistical evidence is not relevant to show an adverse impact. The second step of establishing the prima facie case is for a plaintiff to prove through *relevant* statistical analysis that the facially neutral employment practice has an adverse impact on a protected group. As proof that this action had a disparate impact on older workers, Plaintiffs state that by abolishing the Captain rank, 100% of the employees impacted by the decision were over the age of forty while 0% were under that age. Plaintiffs further state that the average age of the Captains was 56.2 while the average age of all other ranks was 37.81. Plaintiffs also point out that the MPD employed 826 employees over the age of forty (39.9% of the workforce) and 1245 below the age of forty (60.1% of the workforce). Of the 826 employees over the age of forty, 11.25% (93 employees) were impacted by the abolishment of the Captain rank. Of the 1245 employees below the age

of forty, 0% were impacted. Plaintiffs' expert determined that this disparity was statistically significant and extremely unlikely to have occurred by chance.

Plaintiffs' statistical analysis compares the Captains to several other groups. First, Plaintiffs compare all employees affected by the decision who are over the age of forty with those under the age of forty and note that 100% of employees impacted by the decision were over forty. The Court finds that this comparison is not relevant to show disparate impact, however, as by necessity, all employees affected by the decision, the Captains, had to be over the age of forty. The City Charter required thirty years of service to be promoted to Captain, thus ensuring that every Captain was within the protected class. Furthermore, Defendant's action only affected Captains, no other rank. Therefore, this statistical difference is expected and does not lead to an inference of discrimination. Second, Plaintiffs compare those employees impacted by the decision and those who were not. Plaintiffs assert that this is an appropriate comparison because all employees were potentially subject to demotion and to a reduction in salary as part of the budget crisis. Again, Plaintiffs note that of the 826 employees over age forty 11.25% (93) were impacted by the decision to abolish the Captain rank while of the 1245 employees under forty, none were impacted. The Court finds that this comparison is also not relevant as the City's abolishment of the rank of Captain only applied to Captains who, by the terms of the rank, must be over the age of forty, and the decision did not apply across the board to all ranks. Third, Plaintiffs compare the Captains to the acting Lieutenants. Plaintiffs note that the average age

of the Captains (56.52) was higher than the average age of the acting Lieutenants (42.11). Fourth, Plaintiffs compare the Captains to the 120 promoted Lieutenants. Plaintiffs assert that this comparison is relevant because these promoted Lieutenants were permanent replacements for the Captains. Plaintiffs state that the average age of the Captains (56.52) was higher than the average age of these promoted Lieutenants (41.25). The Court finds, however, that these statistical differences are not relevant to show disparate impact as it is to be expected that officers holding a senior rank would be older than officers holding a subordinate rank. Furthermore, Defendant asserts that Lieutenant is not a proper comparison rank as Lieutenants were subordinate to Captains, were paid less than Captains, and largely had different duties and responsibilities than Captains. Thus the Court finds that Plaintiffs have not shown that Defendant implemented a facially neutral policy or practice that had a statistically significant disparate impact on older employees. Because Plaintiffs have not established a prima facie case of disparate impact age discrimination, Defendant's Motion for Summary Judgment is GRANTED.

3. Reasonable Factors Other than Age

Even if Plaintiffs had made out a prima facie case of age discrimination, Defendant's Motion must still be granted as Defendant has shown that its actions were based on a reasonable factor other than age ("RFOA"). Once a plaintiff has established a prima facie case, the employer can rebut the inference of discrimination by asserting that its neutral policy was based on a reasonable

factor other than age.[50] The United States Supreme Court recently held that the defense of RFOA is an affirmative defense on which the employer bears both the burden of production and the burden of persuasion.[51] Thus, under *Meacham*, the employer must show that the factor other than age was a reasonable one.[52] Under this standard,

> the more plainly reasonable the employer's "factor other than age" is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious. It will be mainly in cases where the reasonableness of the non-age factor is obscure for some reason, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion.[53]

In this case, Defendant has met this burden. The MPD determined that it had no need for a management level rank achieved solely by length of service, and Director Godwin decided to abolish the rank of Captain because the position was not operationally necessary. He also estimated that abolishing the Captain rank could result in

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50. *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006); *see also Adams v. Lucent Tech., Inc.*, 2007 WL 14593, at *6 (S.D. Ohio Jan. 3, 2007).

51. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2401 (2008).

52. *Id.* at 2403.

53. *Id.* at 2406.

a savings of $1,400,000. "While there may have been other reasonable ways for the City to achieve its goals, the one[s] selected w[ere] not unreasonable."[54] The reasonableness inquiry does not require a defendant to show that there are no other ways for it to achieve its goals that do not result in a disparate impact on a protected class.[55] In its January 22, 2008, Order Granting Defendant's Motion for Summary Judgment, the Court found that Plaintiffs had failed to prove that Defendant's reasons were a pretext for discrimination. The Court now finds that Defendant's RFOAs are plainly reasonable, and Plaintiffs have not demonstrated that genuine issues of material fact exist as to whether Defendant's RFOAs were reasonable. For this reason as well, the Court GRANTS Defendant's Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Second Motion for Summary Judgment. The Clerk will enter judgment accordingly.

IT IS SO ORDERED.

/s/
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: July 31st, 2008.

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54. *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005).

55. *Id.*

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION, FILED JANUARY 29, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 05-2966 B

DONALD ALDRIDGE, et al.,

Plaintiffs,

v.

CITY OF MEMPHIS and LARRY GODWIN,
in his individual capacity,

Defendants.

ORDER GRANTING MOTION TO DISMISS OF DEFENDANT GODWIN IN HIS INDIVIDUAL CAPACITY

In his January 20, 2006 answer to the complaint filed by the Plaintiffs in this action, Defendant Larry Godwin, in his individual capacity, moved to dismiss all claims pertaining to him for violation of the United States and Tennessee constitutions and 42 U.S.C. §§ 1981, 1983 and 2000e. In their response to the motion, the Plaintiffs identify two federal constitutional claims asserted against Godwin: (1) deprivation of due process in violation of the

Fourteenth Amendment based on a property interest in their continued employment as captains and (2) denial of equal protection under the Fourteenth Amendment. In previous orders, this Court has dismissed these claims against the municipal Defendant, the City of Memphis (the "City"). The analysis and disposition as to those claims with respect to the City also apply to the individual Defendant. Therefore, the federal claims against Godwin are DISMISSED for the reasons set forth by the Court in its previous decisions in this matter.

In their response, the Plaintiffs correctly point out that the Defendant has not sought dismissal of the state claim leveled against him in Count III of the complaint, alleging interference with contract rights. However, as the Court has previously held herein that no contract existed between the City and the Plaintiffs, Godwin cannot be held liable for interference therewith. Accordingly, the state claim against this Defendant is also DISMISSED.

IT IS SO ORDERED this 29th day of January, 2008.

s/
J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION, DATED JANUARY 22, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 05-2966 B

DONALD ALDRIDGE, et al.,

Plaintiffs,

v.

CITY OF MEMPHIS and
LARRY GODWIN, in his individual capacity,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND PROCEDURAL BACKGROUND

This action was brought on December 27, 2005 by the Plaintiffs, Donald Aldridge; Julie Barrow; Claudette Boyd; Walter Carver; Kenneth Connatser; Charles Freeman; James Holland; James Holmes; Ricky Hutcheson; Larry Jackson; James Jones, Jr.; Ernest Lancaster; Richard Millen; Bertha Nelson; David O'Bryan; George Olive;

Cham Payne; Alan Pendleton; William Phillips; William Porter; David Robertson; Robert Stone; Roy Thomas; Lennel Torrance; Mike Wagner and Tommy Woods, who were, according to the complaint, employed as captains with the Memphis, Tennessee Police Department ("MPD" or "the Department") until March 23, 2005. Named as Defendants herein are the City of Memphis (the "City") and Larry Godwin, MPD Director of Police Services, in his individual capacity. The Plaintiffs have alleged violations of 29 U.S.C. § 621, *et seq.*; 42 U.S.C. §§ 1981, 1983 and 2000e, *et seq.*; Article I, § 8 of the Tennessee Constitution and the Tennessee Human Rights Act, Tennessee Code Annotated § 4-21-401, et seq. ("THRA"). The Plaintiffs have also set forth state-law claims of breach of contract, breach of the duty of good faith and fair dealing as to the City and interference with contract rights and violation of civil rights against Godwin individually. In an order entered February 21, 2007 (the "February 2007 Order"), the Court granted partial dismissal to the Defendants as to the Plaintiffs' due process claims based on City of Memphis Charter § 67 and claims of gender discrimination under § 1981. The Court also dismissed any § 1981 claims of race discrimination to the extent they were pled independent of § 1983. On December 27, 2007, this Court held, on cross-motions of the parties for summary judgment, that no due process claim arose from an implied contract for continued employment. Pending before the Court is the remainder of the Defendant's motion for summary judgment, seeking disposition of the Plaintiffs' claims of breach of contract, violation of equal protection and discrimination on the bases of race, gender and age.

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SUMMARY JUDGMENT STANDARD

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, states in pertinent part that a

> . . . judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56©; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "In order to defeat a summary judgment motion, the nonmoving party must show sufficient evidence to create a genuine issue of material fact." *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007) (citing *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir. 2002)) (internal quotation marks omitted). In doing so, the nonmovant must "provide more than a scintilla of evidence." Rather, "there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986).

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FACTS

The following facts are undisputed unless otherwise noted. There are twenty-six Plaintiffs, nine of whom are black and three of whom are female. The remainder are white males. The Plaintiffs are police officers employed by the MPD who prior to March 2005 had attained the rank of Captain. Pursuant to the Memphis City Charter, promotion to Captain was automatic upon thirty years of service. On February 18, 2005, Defendant Godwin announced the abolishment of the Captain's rank in response to a budget crisis being suffered by the City of Memphis. Godwin advised the Captains that they could either immediately retire at their current rank or return to their previous rank.

ANALYSIS OF CLAIMS AT ISSUE

Breach of Contract.

To the extent the Plaintiffs' breach of contract claim is based on an implied contract for continued employment arising from the Memphis City Charter or a policy, custom or practice of the City, it is dismissed for the reasons set forth in the Court's order entered December 28, 2007. In the complaint, some of the Plaintiffs alleged that they entered into a contract with the City and its pension fund to retire on a date certain and receive benefits pursuant to a Deferred Retirement Option Plan (DROP). They averred that

> [p]ursuant to the agreement, plaintiffs made an "irrevocable" election to retire as of a date

certain; however, they would continue working for the police department at the same pay and rank, e.g., captain for up to three years.

The pension benefit would be "frozen," meaning that the employee would no longer receive any further credits for years served after the agreement. The pension benefit would be calculated on the basis of the lower salary schedules on the date of the agreement, not on the date the plaintiffs actually stopped working for the City.

The pension benefit that plaintiffs would have been entitled to receive during the time they were working pursuant to the DROP program would be placed in a separate account and would be paid out in a lump sum at the time plaintiffs actually stopped working.

On the date the plaintiffs actually stopped working, they would then begin receiving their monthly pension based on the (lower) rates and schedules in effect at the time they entered the DROP.

DROP provided the City with a means of retaining its valuable employees while also obtaining an agreement with the employee that on a date certain that employee would retire.

Plaintiffs would receive the lump sum payment when they actually stopped working. A critical

> factor in plaintiffs' acceptance and participation in DROP was their reliance on the captain's salary after the agreement was entered into.

(Compl. at ¶ 66) Therefore, the Plaintiffs asserted, the City's "refusal to pay plaintiffs a captain salary is a breach of the DROP contract." (Compl. at ¶ 66.6) In the instant motion, the Defendant contends that no provision of the DROP could be construed as a contract of continued employment as a Captain.

In Tennessee, "[t]he central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. . . . In construing the contract, the trial court is to determine whether the language is ambiguous. If the language in the contract is clear and unambiguous, then the literal meaning controls the outcome of the dispute." *Hayes v. Washburn*, No. M2006-01135-COA-R3-CV, 2007 WL 3202765, at *3 (Tenn. Ct. App. Oct. 31, 2007) (internal citations and quotation marks omitted). "[W]hen a contract is unambiguous, parol evidence cannot be received to vary, add to, detract from, or contradict the terms of a document, or to modify its legal import. Known as the parol evidence rule, this rule is intended to protect the integrity of written contracts." *Id.* at *5 (internal citations omitted). "Courts in Tennessee have long held that parol evidence cannot be admitted to . . . enlarge . . . the obligation of a written instrument . . . *except on grounds of fraud, accident or mistake*." *Hunt v. Twisdale*, No. M2006-01870-COA-R3-CV, 2007 WL 2827051, at *5 (Tenn. Ct. App. Sept. 28, 2007) (emphasis in original). However, the terms of a written agreement

may be "explained or supplemented . . . by evidence of consistent additional terms . . ." Tenn. Code Ann. § 47-2-202(b). It is undisputed that the forms completed by DROP participants do not contain language concerning the salaries or ranks of employees. The Plaintiffs submit that parol evidence is necessary to "explain or supplement" the agreement.

> They point to the deposition testimony of Plaintiff George M. Olive, who stated that
>
> I signed up for three years. I was promised and said this was an irrevocable agreement. That after the end of the three years, they would pay me X amount of money. I would be doing the same job that I was doing. My salary would increase because the pension would not be taken out anymore. It would be added to my salary, and it was an irrevocable agreement. . . .

(Dep. of George M. Olive at 66) Plaintiff James H. Jones, Jr. testified that

> when I went over to sign up for the DROP agreement, Ms. Pickens told us that we would remain at the same rank that we were, receive the same pay that we were receiving at the time of the DROP, and would receive that until the time we retired at the end of the DROP, and should expect an increase in our take-home pay due to the fact that we wouldn't be paying into the pension anymore. And to me, that was a perceived contract.

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(Dep. of James H. Jones, Jr. at 55-56) Plaintiffs Claudette I. Boyd and Alan D. Pendleton, were asked in their depositions whether they would have entered into the DROP had they known they could be demoted from the rank of Captain or that their salaries could be reduced. Both replied in the negative. (Dep. of Claudette I. Boyd at 96, Dep. of Alan D. Pendleton ("Pendleton Dep.") at 30) Plaintiffs also proffer a brochure provided to employees by the City, which states that "[y]ou continue to be an active employee for all purposes and treated the same (including not participating in Social Security), except you are treated as retired for purposes of participating in the Retirement Plan." (Dep. of Marilyn Pickens ("Pickens Dep.") Ex. 16(a))

According to the evidence presented, Marilyn Pickens was the Defendant's pension supervisor who assisted its employees with the DROP applications and other retirement matters. Those portions of her deposition testimony provided to the Court by both parties are, in pertinent part, as follows:

> Q: . . . And I guess you give an explanation to employees when they come in?
>
> A: Sure.
>
> Q: To apply for [DROP]?
>
> A: Sure.
>
> Q: Do you recall what you tell the employees?

A: That to join the DROP Plan, you have to have at least 25 years in the pension plan.

Q: Okay.

A: Once your job is effective, you stop contributing to the pension plan because your retirement is going to be calculated as of that effective date.

Q: Now, when you say retirement, you're talking about the retirement benefit?

A: Right, the semi-monthly benefit.

Q: Okay. So that at that point in time the effective date is the date that they calculate what the pension benefit would be?

A: Correct.

Q: Okay. Go on.

A: Any raises or promotions you get, increases in pay you get after your DROP effective date will not affect your pension because your pension is calculated.

Q: Okay. Anything else?

A: And it is an irrevocable election. Once you complete the paperwork and enroll in the

DROP, you cannot ask to take it back.

Q: Do you recall if you tell the applicants anything else?

A: Well, I tell them the process. The DROP enrollment has to go before the pension board for processing, and then the paperwork goes to the payroll depar‘ ment for calculation of the semi-monthly benefit. I get a report back from payroll as to those amounts. Then I send a letter to the individual's home so they will know the amount of their semi-monthly pension and what's going into the DROP Plan for them.

* * *

A: I'm the primary person.

Q: To take the applications?

A: Correct.

Q: And when the employee comes in to discuss this, do you have any discussion about the salary that they would receive once they enter into the DROP Program?

A: Well, sometimes they may ask me to do [an] estimate of what their benefit would be, and I tell them the salary that I am using is just

your base salary. If you're in the 48 Plan, I'm using a 12-month average of your base salary.

Q: Okay.

A: If you're in the 78 plan, I'm using a three-year average of your base salary.

Q: Okay. Well, if a police captain had come in to talk to you sometime in -- before February the 18th of 2005, how would you have -- what would you have told the police captain about the DROP Program?

A: If I have a commissioned employee come in with at least 30 years in the pension plan, I'm going to use the 30-year captain salary to give them that estimate.

Q: Okay. And you explain the DROP Program to the individual; is that right?

A: Yes, correct.

Q: And in that explanation have you ever told the applicant that their salary as a captain would decrease during the time that they participated in the DROP Program?

A: I'm not understanding. The salary would decrease?

Q: Yes. Have you ever told any of the applicants to the DROP Program that were police captains prior to February the 18th, 2005, that their salary would drop?

A: No.

(Pickens Dep. at 11-15)

Q: Okay. Now, when the applicant came in to discuss the DROP Program with you, do you recall telling the applicants that their salaries would actually increase?

A: No.

Q: Because of their enrollment in the DROP Program?

A: No.

Q: Do you recall telling any of the applicants that their net take-home pay would increase because of their enrollment in the DROP Program?

A: No.

Q: Okay. Now, when a person enrolls in the DROP Program, the City no longer makes a pension contribution for them; is that correct?

A: That's correct.

Q: And the City no longer takes out the eight and a quarter percent pension contribution that the employee makes; is that right?

A: That's correct.

Q: So the pension contribution made by the employee is then kept by the employee; is that right?

A: It goes back into their check.

Q: Okay. So they would actually receive an increase in their net take-home pay; is that right?

A: They may, but I don't tell them that. I mean, I just tell them that that money goes back into their check.

Q: Okay.

A: The net and also the taxable income go in there.

Q: Right. Are you familiar with the representations made by the City that the employees' net take-home pay would actually increase if they participated in the DROP Program?

A: No, I'm not aware that the City . . . is saying that.

(Pickens Dep. at 17-18) In her declaration, Pickens averred that she did not "promise officers that they [would] remain at a particular rank or maintain a particular salary during the Plan. In fact, [she] advised them that, if their salary change[d] after entering the Plan, their pension benefits [would] be based on their salary at the time they enter[ed] the Plan." (Decl. of Marilyn Pickens at ¶ 3)

It is the Plaintiffs' position that this parol evidence explains the parties' agreement "relating to the salary to be paid during the contract period" and supplements the agreement to establish missing essential terms, such as the salary to be paid and the job the Plaintiffs were to perform. However, there is no evidence of any oral promise to pay a certain salary or to maintain Plaintiffs in their rank as Captains. The Plaintiffs' argument, regretfully, is nothing more than another vain attempt to create a contract where there is none. The DROP application was not an employment contract; nor was it meant to be. It was merely a document establishing participation in a retirement plan and would therefore obviously not have terms regarding salary and the duties of the employee, such as an employment contract would be expected to contain. The motion for summary judgment on the breach of contract claim, to the extent it has survived the Court's previous orders, is GRANTED.

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Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o state shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Defendant argues that the claim must be dismissed as it was not brought pursuant to § 1983. The claim is contained in Count One of the Complaint, which alleges "breach of contract, due process and equal protection violations." (Compl. at ¶¶ 57-67) The Equal Protection Clause is also mentioned in Count Two with respect to claims of race and/or gender discrimination. (*See* Compl. at ¶ 72) Nowhere in either count do the Plaintiffs mention § 1983. Actions alleging violation of the Fourteenth Amendment's Equal Protection Clause must be brought pursuant to § 1983. *See Thomas v. Shipka*, 818 F.2d 496, 502 (6th Cir. 1987), *vacated & remanded on other grounds*, 488 U.S. 1036, 109 S. Ct. 859, 102 L. Ed. 2d 984 (1989) ("By enacting § 1983, Congress has provided an appropriate and exclusive remedy for constitutional violations committed by municipalities"); *Stefanovic v. Univ. of Tenn.*, 935 F. Supp. 950, 952 (E.D. Tenn. 1996) (§ 1983 exclusive remedy for alleged constitutional violation where plaintiff states a claim under § 1983); *Ocean Acres Ltd. P'ship v. Dare County Bd. of Health*, 514 F. Supp. 1117, 1123 (D.C. N.C. 1981), *aff'd* 707 F.2d 103 (4th Cir. 1983) (finding plaintiff's due process and equal protection claims against municipality could only be brought pursuant to § 1983).

In response to the City's contention, the Plaintiffs state that "[t]o the extent that plaintiffs' complaint must be

clarified; plaintiffs move to amend and state that all 14th Amendment claims alleged in the Complaint are asserted through 42 U.S.C. § 1983. Plaintiffs will file a formal amendment of their Complaint if that is necessary." (Pls.' Resp. in Opp'n to Def. City of Memphis' Mot. for Summ. J. at 36) The Plaintiffs have not filed a motion to amend their complaint in order to allege an equal protection claim pursuant to § 1983. Nor did they submit to the Court a certificate of consultation reflecting that they consulted with opposing counsel prior to the request contained in their response to amend their complaint. *See* LR7.2(a)(1)(B), Local Rules of the United States District Court for the Western District of Tennessee (requiring that motions be accompanied by a certificate of consultation "affirming that, after consultation between the parties to the controversy, they are unable to reach an accord as to all issues or that all other parties are in agreement with the action requested by the motion. . . . Failure to file an accompanying certificate of consultation may be deemed good grounds for denying the motion.") To the extent the Plaintiffs' complaint sets forth a direct claim for violation of the Fourteenth Amendment, it is without merit, as § 1983 provides the exclusive remedy for such a claim. *See Teague v. Commonwealth of Ky.*, No. Civ.A. 3:05CV-P-448S, 2005 WL 3099000, at *5 (W.D. Ky. Nov. 17, 2005), *review denied* (Jan. 11, 2006) (to the extent plaintiff alleged direct claim for violation of equal protection clause of Fourteenth Amendment, claim failed on grounds that § 1983 provides exclusive remedy); *Stefanovic*, 935 F. Supp. at 952 (to the extent plaintiff sought to proceed directly under Fourteenth Amendment and not pursuant to § 1983, which provided exclusive remedy, dismissal appropriate).

Appendix E

Race and Gender Discrimination.

The Defendant further seeks summary judgment of the Plaintiffs' race and gender discrimination claims under Title VII, 42 U.S.C. § 2000e, *et seq.* and the THRA[1] based on disparate treatment. Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race [or] sex . . ." 42 U.S.C. § 2000e-2(a)(1). Disparate treatment as posited by the Plaintiffs "occurs when an employer treats some employees less favorably than others because of race, religion, sex, or the like." *Huguley v. Gen. Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995). A plaintiff may prevail by presenting direct evidence of discrimination or by presenting circumstantial evidence, utilizing the evidentiary framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), from which a factfinder could draw an inference of discriminatory motive. *See Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 463 (6th Cir. 2003).

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1. The Plaintiffs' THRA claim is to be analyzed in the same manner as the Title VII claim. As the Tennessee Supreme Court has noted, "[a]lthough the language differs slightly, it is clear that the legislature intended the THRA to be coextensive with federal law. We, therefore, may look to federal interpretation of Title VII for guidance in enforcing our own anti-discrimination statute." *Phillips v. Interstate Hotels Corp. No. L07*, 974 S.W.2d 680, 683-84 (Tenn. 1998) (internal citation omitted); *see also Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1075-76 (M.D. Tenn. 2000).

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In cases such as that at bar in which no direct evidence of discrimination has been offered, a plaintiff must show, under the well-settled *McDonnell Douglas/ Burdine* paradigm, that "(1) [he or] she is a member of a protected class, (2) [he or] she was subjected to an adverse employment action, (3) [he or] she was qualified, and (4) [he or] she was treated differently than similarly-situated male and/or nonminority employees for the same or similar conduct." *McClain v. Nw. Cmty. Corr. Ctr. Judicial Corr. Bd.*, 440 F.3d 320, 332 (6th Cir. 2006). If the plaintiff "sustains [his or] her burden of establishing a prima facie case, the burden then shifts to [the employer] to articulate a legitimate, nondiscriminatory reason for [its actions]. If [the employer] successfully carries its burden, the burden returns to [the plaintiff] to produce evidence from which a jury could find that [the employer's] stated reason is merely pretextual." *Id.*

The Defendant's motion appears to focus solely on the fourth element of the prima facie case. With respect to this prong, the Plaintiffs must demonstrate that they were "treated differently than similarly situated employees from outside the class." *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610-11 (6th Cir. 2002). The City argues that the Plaintiffs' comparison group--former Captains--is flawed because it encompasses both white and black Captains, as well as males and females.

In response, the Plaintiffs maintain that, because of past discrimination, the Captain benefit fell primarily to white males, although some females and blacks also became eligible for promotion. At the time the rank was

abolished, they posit, there were more females and blacks serving as Captains than any other time in the history of the MPD. In support of their contention, the Plaintiffs submit that, although available in this Circuit only in class actions or suits by the government, "pattern-or-practice" evidence, "in which the plaintiff shows that the company had a policy of discriminating against a protected class," "may be relevant to proving an otherwise viable individual claim for disparate treatment under the *McDonnell Douglas* framework." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004), *cert. denied* 543 U.S. 1151, 125 S. Ct. 1334, 161 L. Ed. 2d 115 (2005); *see also Reynolds v. Georgia-Pacific Corp.*, No. C-1-03-459, 2006 WL 212069, at *5 n.4 (S.D. Ohio Jan. 25, 2006) (based on language in *Bacon*, court considered pattern-or-practice evidence in individual case).

The pattern-or-practice evidence referred to by the Plaintiffs is offered to show that the City was slow to hire blacks and women until the 1970s, when the City entered into a consent decree in which it agreed to remedy under-representation of those minority groups in its workforce. The Plaintiffs also point out that the City hired its first female patrol officers in 1973. However, this case is not about the Defendant's hiring practices. Rather, the Plaintiffs have alleged race and gender discrimination with respect to the abolishment of the Captain's rank. To demonstrate that the Defendant's actions were discriminatory, the Plaintiffs must show that protected black and female Captains were treated differently from nonprotected white and male Captains. *See Clayton*, 281 F.3d at 610-11. They have failed to do so. Indeed, the uncontroverted evidence clearly establishes that all

Captains were treated the same, regardless of the time period or the racial/gender make-up of the rank at any particular time. Moreover, statements of Godwin cited by the Plaintiffs in support of their claim in fact further weaken their case. According to the Plaintiffs, Godwin expressed longstanding ill will against Captains because he thought members of the rank had interfered with his career, often stating that he wished they would all die. No mention of race or gender on his part during these alleged tirades has been made by the Plaintiffs. In short, there is no evidence to suggest that white and male Captains were treated better than those who were black or female. The abolition of the Captain rank had the same effect on all. Thus, the Plaintiffs cannot establish a prima facie case of discrimination based on race or gender, and summary judgment as to those claims is appropriate. *See Johnson v. City of Clarksville*, 186 F.App'x 592, 595 (6th Cir. 2006) (plaintiff failed to establish prima facie case for disparate treatment where he had not shown that any similarly-situated nonprotected employee received more favorable treatment); *May v. GMC Mansfield Metal Fabricating*, 61 F.App'x 171, 173 (6th Cir.), *cert. denied*, 540 U.S. 965, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003) (where evidence revealed that protected and nonprotected employees were not treated differently, racial discrimination claim must fail); *Eberenz v. Cincinnati Children's Hosp.*, No. 1:05cv297, 2006 WL 3422704, at *6 (S.D. Ohio Nov. 28, 2006) (pattern-or-practice evidence in individual case showing that females were treated poorly of little benefit where defendant proffered evidence that males were treated in the same manner); *McCarter v. West*, 910 F. Supp. 519, 524-25 (D. Kan. 1995), *aff'd* 105 F.3d 1335 (10th Cir. 1997) (where statistical evidence offered by plaintiff

to prove disparate treatment involved both protected and nonprotected employees, evidence failed to establish that only male counterparts were treated favorably).

Age Discrimination.

Federal claims of discrimination on the basis of age are governed by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, which provides that it is "unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Similarly, the THRA prohibits the discharge of an employee because of his age. Tenn. Code Ann. § 4-21-401(a)(1). Claims of age discrimination under the THRA are analyzed in the same manner as those brought under the ADEA. *Newsom v. Textron Aerostructures*, 924 S.W.2d 87, 96 n.12 (Tenn. Ct. App. 1995), *app. denied* (Feb. 26, 1996). In analyzing an ADEA disparate treatment claim, the Court is to apply the same burden-shifting framework articulated in *McDonnell Douglas* and set forth in the preceding section. *See Blair v. Henry Filters, Inc.*, 505 F.3d 517, 523-24 (6th Cir. 2007). For purposes of this motion, the Defendant does not take issue with whether Plaintiffs have satisfied their burden in establishing a prima facie case of age discrimination, but, rather, addresses only the issue of pretext.

Pretext may be demonstrated by showing that the articulated reasons of the employer "(1) had no basis in fact, (2) did not actually motivate the adverse action taken against [him or] her, or (3) were insufficient to

motivate the adverse action taken against [him or] her." *McClain*, 440 F.3d at 332 (citation omitted). "In attacking an employer's explanation for the discharge, a plaintiff may not rely upon mere personal beliefs, conjecture and speculation. Nor can a plaintiff prove pretext merely by asserting that a better business decision could have been made." *Messner v. Lockheed Martin Energy Sys., Inc.*, 126 F. Supp. 2d 502, 521 (E.D. Tenn. 2000) (internal citations and quotation marks omitted). "The ADEA does not grant authority to judge the wisdom of a corporation's business decisions." *Godfredson v. Hess & Clark, Inc.*, 996 F. Supp. 730, 739 (N.D. Ohio 1998), *aff'd* 173 F.3d 365 (6th Cir. 1999). Moreover, "[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations." *Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994).

The City identifies as its legitimate nondiscriminatory reason for abolishing the Captain rank its decision that the position was not operationally necessary. The Defendant notes that MPD employees were promoted to Captain, ostensibly a supervisory position, after thirty years of service regardless of whether they obtained any supervisory experience during that period and without undergoing merit based promotional testing. Many were Patrolmen and Sergeants at the time of their automatic promotion. These Captains were often assigned to positions that could have been filled by Lieutenants, Sergeants, Patrolmen or even civilians, even though they were paid at the same level as Majors. Majors, Lieutenants and Sergeants were promoted based on need through a promotions procedure that included testing. It was

determined by the Department that there was simply no need for a management level rank achieved solely by length of service, particularly in light of instructions from City administrators to review the Department's budget with an eye toward trimming costs. According to Godwin, eight Captains retired and were not replaced. He estimated that the Department could potentially see a savings of $1,400,000 as a result of abolishing the Captain rank. Keith McGee, the City's chief administrative officer, testified in his deposition that, although the proposal was introduced during a budgetary season and could have some budgetary impact, it was an operational request. Further, there was precedent for the action, as the Memphis Fire Department had abolished its thirty-year Captain rank in 1988.

In response, the Plaintiffs posit that it is irrelevant that the Defendant believed the rank of Captain was unnecessary. They point first to Godwin's deposition testimony to the effect that retaining the rank would not have caused operational inefficiencies. However, Godwin insisted in the same sentence that the rank was not operationally necessary. The Plaintiffs further assert that they had earned the benefit of being paid a Captain's salary until they chose to retire and that the Department had honored its promises to other employees by continuing to pay step increases, etc.[2] They also maintain that other Department directors believed that Captains were

2. The Plaintiffs also argue that the Defendant's statements that not all Captains had supervisory experience is meaningless. However, the Defendants have not proffered lack of supervisory experience as a legitimate nondiscriminatory reason for abolishing the Captain rank.

necessary, including Godwin's immediate predecessor, James Bolden, who scheduled a lieutenant's promotion process in September 2004, which was rescheduled by Godwin for January 2005 following his appointment. By abolishing the Captain rank, they aver, Godwin was allowed to make more lieutenant promotions, including the promotion of his personal assistant. As to the City's budgetary concerns, the Plaintiffs note that Godwin was unable to testify there would actually have been any savings, taking into account the concomitant expenses. In addition, the Defendants have been unable to produce documentation indicating that abolition of the Captain rank resulted in any savings whatever. However, the former Captains have offered no evidence that the savings projections were not reasonable. At bottom, the Plaintiffs' arguments amount to discontent over the Department's choice to abolish their rank. The Plaintiffs have not, as they must, shown that the Defendant's legitimate nondiscriminatory reason for abolishing the Captain rank was pretextual.[3]

In their response to the motion, Plaintiffs submit that they need not prove pretext, as there exists direct evidence to support their age discrimination claim. Indeed, "if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case." *Swierkiewicz v. Sorema*

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3. District Judge Hardy Mays of this Court reached the same conclusion in the companion case of *Balee v. City of Memphis*, No. 06-2062, which has been consolidated with this matter for discovery purposes. (*See* Order Granting in Part & Deferring in Part Def.'s Mot. for Summ. J. at 27-29)

N.A., 534 U.S. 506, 511, 122 S. Ct. 992, 997, 152 L. Ed. 2d 1 (2002). Direct evidence has been defined as "evidence that proves the existence of a fact without requiring any inferences." *Blair*, 505 F.3d at 523 (citation omitted). "When a plaintiff establishes discrimination through direct evidence, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive." *Id.* (citations and internal quotation marks omitted).

The Plaintiffs maintain that the decision to abolish only the Captain rank, composed of employees over forty, constitutes direct evidence of discriminatory animus. In doing so, however, they fail to point to any evidence in the record to support their claim. Instead, the evidence presented to the Court shows without contravention that the Plaintiffs suffered the adverse action alleged because they were Captains, not because they were over the age of forty. Thus, the Plaintiffs cannot survive summary judgment on their age discrimination claim based on direct evidence.

CONCLUSION

For the reasons articulated herein, the motion of the Defendant for summary judgment is GRANTED as to the claims discussed above. Two other claims merit separate comment: (1) disparate impact as to race and gender and (2) § 1981 race discrimination claim brought pursuant to § 1983. Although the complaint appears to allege race and gender discrimination pursuant to a disparate impact theory, the Plaintiffs have advised the Court that they

do not intend to pursue such a claim. (*See* Pls.' Resp. in Opp'n to Def. City of Memphis' Mot. for Summ. J. at 57) With respect to the § 1981 claims, the Defendant states in its motion that they had already been dismissed by the Court. In the February 2007 Order, the Court indeed dismissed the § 1981 gender claim based on the Plaintiffs' representation that they did not wish to pursue the claim. However, as pointed out by the Plaintiffs, the Court further determined that the § 1981 race discrimination claims were dismissed to the extent they were pled independent of § 1983. Properly pled § 1981 race claims, brought pursuant to § 1983, therefore remained before the Court. (*See* February 2007 Order at 10) As the Defendant in its dispositive motion has not sought dismissal of these claims, dismissal cannot at this point be granted.

IT IS SO ORDERED this 22nd day of January, 2008.

/s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION FILED DECEMBER 28, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 05-2966 B

DONALD ALDRIDGE, et al.,

Plaintiffs,

v.

CITY OF MEMPHIS and LARRY GODWIN,
in his individual capacity,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND PROCEDURAL BACKGROUND

This action was brought on December 27, 2005 by the Plaintiffs, Donald Aldridge; Julie Barrow; Claudette Boyd; Walter Carver; Kenneth Connatser; Charles Freeman; James Holland; James Holmes; Ricky Hutcheson; Larry

Jackson; James Jones, Jr.; Ernest Lancaster; Richard Millen; Bertha Nelson; David O'Bryan; George Olive; Cham Payne; Alan Pendleton; William Phillips; William Porter; David Robertson; Robert Stone; Roy Thomas; Lennel Torrance; Mike Wagner and Tommy Woods, who were, according to the complaint, employed as captains with the Memphis, Tennessee Police Department ("MPD") until March 23, 2005. Named as Defendants herein are the City of Memphis (the "City") and Larry Godwin, MPD Director of Police Services, in his individual capacity. The Plaintiffs have alleged violations of 29 U.S.C. § 621, *et seq.*; 42 U.S.C. §§ 1981, 1983 and 2000e, *et seq.*; Article I, § 8 of the Tennessee Constitution and Tennessee Code Annotated § 4- 21-401. The Plaintiffs have also set forth state-law claims of breach of contract, breach of the duty of good faith and fair dealing as to the City and interference with contract rights and violation of civil rights against Godwin individually. In an order entered February 21, 2007 (the "February 2007 Order"), the Court granted partial dismissal to the Defendants as to the Plaintiffs' due process claims based on City of Memphis Charter § 67 and claims of gender discrimination under § 1981. The Court also dismissed any § 1981 claims of race discrimination to the extent they were pled independent of § 1983. Currently pending before the Court are the cross-motions of the Plaintiffs and the City for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the issue of the existence of an implied contract.[1]

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1. The motion for summary judgment filed on behalf of the Defendant also seeks disposition of other claims brought by the Plaintiffs in this case. Those claims will be addressed by separate order.

Appendix F

SUMMARY JUDGMENT STANDARD

Rule 56 states in pertinent part that a

> . . . judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "In order to defeat a summary judgment motion, the nonmoving party must show sufficient evidence to create a genuine issue of material fact." *Gorder v. Grand Trunk W. R.R., Inc.*, ___ F.3d ___, 2007 WL 4302412, at *2 (6th Cir. Dec. 11, 2007) (citing *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir. 2002)) (internal quotation marks omitted). In doing so, the nonmovant must provide more than a "scintilla of evidence" in support of his position. Rather, "there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986).

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FACTS

The following facts are undisputed unless otherwise noted. Each of the Plaintiffs were promoted to the rank of captain in the MPD pursuant to § 67 of the City of Memphis Charter, enacted by the Tennessee General Assembly effective April 26, 1927. The statute provided that

> [a]ny fireman or policeman, who shall have served the City of Memphis for a period of thirty (30) years, either continuously or intermittently, shall, at the expiration of said thirty years, automatically be promoted to the rank of captain of the Fire Department or captain of the Police Department, with all the salary, emoluments and other privileges of said rank; and that, upon the retirement of such fireman or policeman, he shall receive a pension as captain.

City of Memphis Charter § 67.

From the time the Plaintiffs were hired until February 18, 2005, the date on which the City announced the abolishment of the rank of captain, police officers who completed thirty years of service were promoted to the rank of captain and were paid a captain's salary. It is the Plaintiffs' assertion, which is disputed by the Defendants, that the "City's custom, practice and policy was to promote police officers who complete 30 years of service to the rank of Captain and pay them a Captain's

salary until they chose to retire unless just cause existed to take an adverse employment action against them." There is no dispute that the Plaintiffs were performing in a satisfactory manner as of February 18, 2005. Upon Defendant Godwin's announcement on that date that the rank of captain was to be abolished in the MPD effective March 23, 2005, the Plaintiffs were given the option of reverting to their position and rank prior to ascending to captain or retiring. The Plaintiffs submitted a written request to Godwin and Memphis mayor W. W. Herenton for a hearing in which they could challenge their demotion and termination of captain's salary. The request was denied, and the Civil Service Commission ruled that it lacked jurisdiction to hear the Plaintiffs' appeal.

ANALYSIS OF CLAIMS AT ISSUE

It is undisputed in this case that all of the Plaintiffs obtained the rank of Captain and that during the time they worked as Captains they received a Captain's benefits. In their motion, the Plaintiffs state that they are seeking partial summary judgment as to their claim that the City violated their right to due process by terminating their Captain's salary without a hearing. Specifically, they contend that the custom, practice and policy of the City was that "[P]laintiffs' compensation for working 30 years included promotion to the rank of Captain and the payment of the Captain's salary until they chose to retire, unless, after a hearing, just cause existed to terminate the payment of the Captain's salary." (Pls.' Mot. for Summ. J. at 11, 15) The Defendant argues in its motion that no such custom, practice or policy existed.

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The Due Process Clause of the Fourteenth Amendment prohibits the state from "depriv[ing] . . . any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. As recently articulated by the Sixth Circuit,

> [t]he right to procedural due process requires that when a State seeks to terminate a protected interest it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective. Importantly, procedural due process rights are only vindicated when a *protected* liberty or property interest is denied without adequate hearing. Thus, in order to succeed on [a procedural due process] claim, [a p]laintiff must show (1) that it was deprived of a protected liberty or property interest, and (2) that such deprivation occurred without the requisite due process of law.

Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich., 470 F.3d 286, 296 (6th Cir. 2006) (internal citations and quotation marks omitted) (emphasis in original). "Property interests are not created by the Constitution but by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 297 (quoting *Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001)) (internal quotation marks omitted). "A property interest in employment can, of course, be created

by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077, 48 L. Ed. 2d 684 (1976) (footnotes omitted); *Gregory v. Hunt*, 24 F.3d 781, 785 (6th Cir. 1994). A unilateral expectation that a job is permanent or that discharge could only be for certain reasons or with particular procedural safeguards is not sufficient to create a property interest. *Duncan v. City of Oneida, Tenn.*, 735 F.2d 998, 1000 (6th Cir. 1984). Nor can a "mere expression of intent or a general willingness to do something . . . amount to an offer." *Lay v. Fairfield Dev.*, 929 S.W.2d 352, 356 (Tenn. Ct. App. 1996), *app. denied* (Sept. 9, 1996) (citation and internal quotation marks omitted).

In the February 2007 Order, the Court granted the Defendants' motion to dismiss the Plaintiffs' due process claim based upon the language of § 67, holding that the statute did not create a constitutionally protected property right to continued employment as a Captain. The Court further stated as follows:

> Although not raised in the motion to dismiss, the Plaintiffs argue in their response, and the Defendant has addressed in its reply, the existence of a property interest in their continued employment as captains on the basis of an implied contract or mutually explicit understanding. This circuit has "recognized that an implied contract or mutually explicit understanding is sufficient to create a property

interest in public employment." *Woolsey v. Hunt*, 932 F.2d 555, 561-62 (6th Cir.), *cert. denied*, 502 U.S. 867, 112 S. Ct. 195, 116 L. Ed. 2d 155 (1991) (citing *Duncan v. City of Oneida*, 735 F.2d 998, 1000 (6th Cir. 1984)). In *Woolsey*, which involved a suit by a former secretary for a state university, the court noted that "[t]he rules or understandings [sufficient to support a liberty or property interest] need not be a formal tenure system or even an explicit contractual provision, but [may consist of] agreements implied from the defendants' words and conduct in the light of the surrounding circumstances . . ." *Id.* at 564. "If such interest is recognized by state law, then the employee possesses a property interest of which the state employer cannot deprive him without providing due process." *Id.*

It is the position of the Plaintiffs that it had been the custom of the City to permit captains to remain at the rank of captain until they chose to retire absent just cause to take adverse employment action against them and that the automatic promotion provision of § 67 made up a portion of the consideration offered by the City to induce them to work for and to continue to be employed by the City. They argue that Tennessee law recognizes the employer-employee relationship as contractual in nature and that the City has breached its duty of good faith and fair dealing by essentially demoting

> them without cause. At the Rule 12(b)(6) stage, the Court cannot conclude that the Plaintiffs have failed to state a claim upon which relief may be granted as to their allegation that a property interest existed in continued employment based on an implied contract or mutually explicit understanding. Thus, this contention remains a part of the Plaintiffs' lawsuit.

(Order Granting Defs.' Mot. for Partial Dismissal & Denying Pls.' Mot. to Certify Question to the Sup. Ct. of Tenn. at 8-9) It is this issue--whether the Plaintiffs have a property interest in continued employment as Captains based on an implied contract or mutual understanding--that is now before the Court on summary judgment. The City's course of conduct, the Plaintiffs submit, created an expectation on their part that they would not be deprived of continued employment without due process.

Tennessee follows the doctrine of employment at will, that is, an employee may be fired for good cause, bad cause or no cause at all. *Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994).

> The employment at-will doctrine has been a part of Tennessee's common-law legal tapestry for more than a century. The doctrine recognizes the concomitant right of either party to terminate such a relationship with or without cause. On the other hand a contract of employment for a definite term may not be terminated before the end of the term, except for good cause or by mutual agreement, unless

> the right to do so is reserved in the contract. It is possible that some contractual right might accrue to an employee as the result of an unlawful termination of such a contract. However, without a clear contract under which such rights may vest, employees in this State possess no property right in their employment . . .

Bennett v. Steiner-Liff Iron & Metal Co., 826 S.W.2d 119, 121 (Tenn. 1992) (internal citations omitted). Thus, "[u]nder Tennessee law, absent an explicit employment contract for a definite term, employees are employees at-will and they lack any property right in their continued employment." *England v. Andrews*, No. 2:05-0008, 2005 WL 2209542, at *7 (M.D. Tenn. Sept. 8, 2005); *see also Cooper v. Frayser-Millington Mental Health Ctr.*, 1986 WL 10222, at *2 (Tenn. Ct. App. Sept. 22, 1986) ("The law is well established in this state that a contract for employment for an *indefinite* term is a contract at will and can be terminated by either party at any time without cause"; therefore, plaintiff's claim that he had an implied contract for continued employment so long as there was not just cause for discharge or employee layoff was subject to dismissal).

The elements of a cause of action for implied contract include

> [a] benefit conferred upon the defendant by the plaintiff, appreciation by the defendant of such benefit, the acceptance of such benefit under such circumstances that it would be

> inequitable for him to retain the benefit without payment of the value thereof. The most significant requirement for a recovery is that the enrichment to the defendant be unjust.

Wilson v. Smythe, No. M2003-00645-COA-R3-CV, 2004 WL 2853643, at *9 (Tenn. Ct. App. Dec. 10, 1994) (quoting *Haynes v. Dalton*, 848 S.W.2d 664, 666 (Tenn. Ct. App. 1992)). In *Price v. Mercury Supply Company, Inc.*, 682 S.W.2d 924 (Tenn. Ct. App. 1984), the plaintiff alleged the existence of an oral contract of continued employment based on his employer's statement that he had nothing to worry about for the rest of his life as far as his job was concerned. *Price*, 682 S.W.2d at 933. The court found no contract existed, because the alleged consideration therefor -- the plaintiff's services rendered in the past -- was inadequate to support a contract based on his previous payment for those services. *Id.*; *see also Wilson*, 2004 WL 2853643, at *9 (same). The court went on to note that "[o]ur courts have long held that an oral contract for life time employment or permanent employment amounts to an indefinite hiring terminable at the will of either party where the employee furnishes no consideration other than the services required in the agreement." *Price*, 682 S.W.2d at 934; *see also White v. Fort Sanders-Park W. Med. Ctr.*, No. E2006-00330-COA-R3-CV, 2007 WL 241024, at *3 (Tenn. Ct. App. Jan. 29, 2007) (court found, based on *Price*, that no implied contract of employment existed where plaintiff failed to describe terms of alleged contract with specificity to show it was supported by adequate consideration or mutual assent to any of its terms). Similarly, in the matter before the Court, the Plaintiffs have offered no evidence of consideration for the implied

contract beyond their services, for which they were undisputedly paid. Nor is there any evidence to suggest that the Plaintiffs were underpaid for their services, which might give rise to an equitable argument. *See Wilson*, 2004 WL 2853643, at *9 (plaintiff who was paid for his services, absent evidence of under-compensation, could not establish existence of an implied contract). Based on the foregoing, the Court finds insufficient evidence to support a claim based on an implied contract.[2]

Nor can the Plaintiffs maintain a due process claim based on an implied contract or mutually explicit understanding arising from the civil service rules. In support of their contention, the Plaintiffs cite to § 246 of the Memphis Charter, which provides that the "City may terminate, suspend, or demote an employee for just cause and the employee shall be given a written notice of the reasons for the action," as well as a previous provision, § 129, which stated that no employee "shall be removed or discharged except for just cause." The Court addressed this question in the February 2007 Order, articulating that the caselaw did not support an interpretation that § 246 created a constitutionally protected property interest in the Plaintiffs' employment. (See Order Granting Def.'s

2. Indeed, the gravamen of the Plaintiffs' argument in favor of a finding that an implied contract exists -- that MPD had always permitted Captains to work until they chose to retire unless just cause was found to terminate them -- would, in the Court's opinion, create an absurd result. If such a position were meritorious, an employer's mere maintenance of a status quo would be sufficient to create an implied contract of "continuing employment" protecting all who came afterward, thereby turning the employment at-will doctrine, as well as its intent, on its head.

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Mot. for Partial Dismissal & Denying Pls.' Mot. to Certify Question to the Sup. Ct. of Tenn. at 7 n.2)

In *Green v. City of Memphis*, No. W2003-01334-COA-R3CV, 2004 WL 1592815 (Tenn. Ct. App. July 15, 2004), the court noted that the City's "terminate, suspend, or demote" language applied only to disciplinary actions and not, as in the case before it, a reassignment resulting from an invalid testing procedure. *Green*, 2004 WL 1592815, at *4. Therefore, the court found that the plaintiffs had no property right of which they could be deprived and, consequently, had no right to a hearing. *Id.* at *5. In this case, the Plaintiffs were not subjected to disciplinary action and, based on *Green*, the Charter provision does not create a property interest or a right to a hearing. Nor does § 129, as the Plaintiffs were neither removed nor discharged.

CONCLUSION

In accordance with the Court's findings herein, the Plaintiffs' motion for summary judgment on the grounds of implied contract is DENIED. The motion of the City for summary judgment as it applies to the existence of a property interest in continued employment based on a theory of implied contract is GRANTED.

IT IS SO ORDERED this 28th day of December, 2007.

s/_____
J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE